UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. PHILIP MORRIS INCORPORATED, et al. Defendants.	Civil Action No. 99-CV-02496 (GK) Next scheduled court appearance: April 15, 2003

UNITED STATES' REPLY TO DEFENDANT LIGGETT'S PRELIMINARY PROPOSED CONCLUSIONS OF LAW AND FINDINGS OF FACT REGARDING AFFIRMATIVE DEFENSES

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DEFENDANT LIGGETT PARTICIPATED IN THE RICO ENTERPRISE AND CONSPIRACY

The United States has conclusively established the existence of the alleged RICO Enterprise and RICO conspiracy and that all the Defendants, including Liggett, participated in both. See United States' Preliminary Proposed Conclusions of Law (hereinafter "PCL") §§ I.B, E and § II and United States' Preliminary Proposed Findings of Fact (hereinafter "PFF") §§ I, III and VII.[1] Defendant Liggett has said nothing that refutes the United States' showing in that regard. Rather, Defendant Liggett makes the unsubstantiated claim that it was never a member of either the RICO Enterprise or RICO conspiracy, which Liggett disavows the existence of, and "did not participate in any of the activities that plaintiff alleges form the basis of the alleged RICO enterprise or conspiracy." See Defendant Liggett's Proposed Findings of Fact and Conclusions of Law Regarding Affirmative Defenses (hereinafter "L. Br.") at p. 4. In particular, Liggett claims that it "did not participate in what plaintiff alleges are the core formation activities of the alleged conspiracy -- the drafting and issuance of the Frank Statement" -- and that the United States has not established "Liggett's actual control of that enterprise." L. Br. at p. 20. Liggett's arguments are based upon an erroneous view of the governing legal principles as well as a complete failure to consider and address the overwhelming evidence of its participation in the RICO Enterprise and conspiracy. As set forth in the United States' Preliminary Proposed

[1] Pursuant to Order Nos. 318 and 323, the United States has submitted, on March 5, 2003, Annotations to its Preliminary Proposed Findings of Fact, which contain references to citations to the United States' PFFs. These references are incorporated herein by reference; where such references do not appear in the United States' Annotations, additional references are set forth herein.

Findings of Fact, the evidence of Liggett's participation in the RICO Enterprise and conspiracy is as overwhelming as it is compelling.

A. The Governing Legal Principles

1. Contrary to Liggett's argument, it is well settled that to establish a RICO conspiratorial agreement, the United States is not required to prove that each co-conspirator participated in all the activities of the conspiracy or "establish that each conspirator explicitly agreed with every other conspirator to commit the substantive RICO crime described in the indictment, or knew his fellow conspirators, or was aware of all the details of the conspiracy. . . . That each conspirator may have contemplated participating in different and unrelated crimes is irrelevant." United States v. Starrett, 55 F.3d 1525, 1544 (11th Cir. 1995) (internal quotations and citations deleted).[2] Rather, it is sufficient that the defendant "know the general nature of the conspiracy and that the conspiracy extends beyond his individual role." United States v. Rastelli, 870 F.2d 822, 828 (2d Cir. 1989)(collecting cases).[3] See also Salinas v. United States, 522 U.S. 52, 63, 65 (1997)(holding that to establish a RICO conspirator's liability, it is not required that the conspirator "agree to commit or facilitate each and every part of the substantive offense. . . . it suffices that [the conspirator] adopt the goal of furthering or facilitating the criminal endeavor");

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[2] Accord United States v. Zichettello, 208 F.3d 72, 99-100 (2d Cir. 2000); United States v. Posada-Rios, 158 F.3d 837, 857-58 (5th Cir. 1998); United States v. To, 144 F.3d at 737, 744-45 (11th Cir. 1998); United States v. Ruiz, 905 F.2d 499, 505 (1st Cir. 1990); United States v. Rastelli, 870 F.2d 822, 828 (2d Cir. 1989)(collecting cases); United States v. Rosenthal, 793 F.2d 1214, 1228 (11th Cir. 1986); United States v. De Peri, 778 F.2d 963, 975 (3d Cir. 1985); United States v. Elliott, 571 F.2d 880, 902-903 (5th Cir. 1978).

[3] Accord Zichettello, 208 F.3d at 100; Posada-Rios, 158 F.3d at 858; United States v. Brazel, 102 F.3d 1120, 1138 (11th Cir. 1997); United States v. Eufrasio, 935 F.2d 553, 577 n. 29 (3d Cir. 1991); Rosenthal, 793 F.2d at 1228; De Peri, 778 F.2d at 975; Elliott, 571 F.2d at 903-04.

United States v. Posada-Rios, 158 F.3d 832, 858 (5th Cir. 1998)(holding that "a defendant may be convicted of a [RICO] conspiracy if the evidence shows that he only participated in one level of the conspiracy . . . and only played a minor role in the conspiracy").

Furthermore, "[b]ecause conspirators normally attempt to conceal their conduct, the elements of a conspiracy offense may be established solely by circumstantial evidence. . . . The agreement, a defendant's guilty knowledge and a defendant's participation in the conspiracy all may be inferred from the development and collocation of circumstances." Posada-Rios, 158 F.3d at 857 (citations and internal quotations omitted). Accord cases cited supra, notes 2 and 3. Moreover, as in the case of conventional conspiracy offenses, each co-conspirator is liable for the acts of all other conspirators undertaken in furtherance of the conspiracy both prior to and subsequent to the co-conspirator's joining the conspiracy. See, e.g., Salinas, 522 U.S. at 63-64; Aetna Cas. Surety Co. v. P & B Autobody, 43 F.3d 1546, 1562 (1st Cir. 1994); United States v. Pungitore, 910 F.2d 1084, 1145-48 (3d Cir. 1990); United States v. Bridgeman, 523 F.2d 1099, 1108 (D.C. Cir. 1975).

As noted in the United States' PCL, there are two alternative methods of establishing a conspiratorial agreement to violate RICO. See PCL § II, pp. 68-74. Under the first method, it is sufficient to establish that the defendant agreed itself to commit at least two racketeering acts in furtherance of the conduct of the affairs of the enterprise.[4] Here, Defendant Liggett committed numerous racketeering acts in furtherance of the affairs of the Enterprise, including Racketeering

[4] See, e.g., United States v. Abbell, 271 F.3d 1286, 1299 (11th Cir. 2001); United States v. Nguyen, 255 F.3d 1335, 1341 (11th Cir. 2001); Brouwer v. Raffensperger, Hughes & Co., 199 F.3d 961, 964 (7th Cir. 2000); To, 144 F.3d at 744; Brazel, 102 F.3d at 1138; United States v. Shenberg, 89 F.3d 1461, 1471 (11th Cir. 1996).

Acts 13, 17, 22, 28, 31, 38, 44, 66, 67, 70, 73, 77, 88, 112, 118 and 126. See infra § II. See also PCL § I.F. and G; PFF §§ V and VI. "Where, as here, the evidence establishes that each defendant, over a period of years, committed several acts of racketeering activity in furtherance of the enterprise's affairs, the inference of an agreement to do so is unmistakable." Elliott, 571 F.2d at 903. Accord United States v. Ashman, 979 F.2d 469, 492 (7th Cir. 1992); United States v. Crockett, 979 F.2d 1204, 1218 (7th Cir. 1992); United States v. Carlock, 806 F.2d at 535, 547 (5th Cir. 1986); United States v. Melton, 689 F.2d 679, 683 (7th Cir. 1982); United States v. Sutherland, 656 F.2d 1181, 1187 n.4 (5th Cir. 1981). Therefore, the evidence establishes that Defendant Liggett is liable for the RICO conspiracy charge under the first alternative method.

Liggett fares no better under the second alternative approach. Under this method, the United States is not required to prove that the defendant personally agreed to commit at least two racketeering acts in furtherance of the conduct of the affairs of the enterprise. See cases cited supra n.4. Rather, it is sufficient to prove that the defendant intended to further or facilitate the substantive RICO offense. For example, in Salinas, the Supreme Court explained:

> A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253-254 (1940). The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other. See Pinkerton v. United States, 328 U.S. 640, 646 (1946)("And so long as the partnership in crime continues, the partners act for each other in carrying it forward"). If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators. As Justice Holmes observed: "[P]lainly a person may conspire for the commission of a crime by a third person." United States v. Holte, 236 U.S. 140, 144 (1915).
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> A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he

> adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues.
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> It makes no difference that the substantive offense under § 1962(c) requires two or more predicate acts. **The interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense**.

Salinas, 522 U.S. at 63-65 (alteration in original; emphasis added).

Thus, to prove a RICO conspiracy under the Salinas alternative, "[t]he focus is on the agreement to participate in the enterprise through the pattern of racketeering activity, not on the agreement to commit the individual predicate acts. . . . The government can prove [such] an agreement on an overall objective by circumstantial evidence showing that each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity." Starrett, 55 F.3d at 1543-44 (internal quotations and citations omitted).[5] Hence, it is sufficient "that the defendant agree to the commission of [at least] two predicate acts [by any conspirator] on behalf of the conspiracy." MCM Partners, Inc. v. Andrews-Bartlett & Assocs., 62 F.3d 967, 980 (7th Cir. 1995), quoting United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986). Accord Brouwer, 199 F.3d at 964; United States v. Quintanilla, 2 F.3d 1469, 1484 (7th Cir. 1993).[6]

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[5] Accord Posada-Rios, 158 F.3d at 857; To, 144 F.3d at 744; Brazel, 102 F.3d at 1138; Shenberg, 89 F.3d at 1471.

[6] Moreover, the indictment or complaint need not specify the predicate racketeering acts (continued...)

The evidence set forth infra § I.B and in PFF §§ I, IV and VII convincingly establishes that, contrary to Liggett's argument, Liggett well knew the general nature of the RICO conspiracy and agreed to participate and did participate in activities which facilitated and furthered the central objectives of the conspiracy including, participation in the: (1) operation and funding of the Council For Tobacco Research ("CTR"); (2) establishing, funding and operation of the Tobacco Institute ("TI"); (3) operation of and the activities of the Center for Indoor Air Research, the Committee of Counsel, the Ad Hoc Committee, CORESTA and other groups and entities; (4) public dissemination of numerous false, deceptive and misleading statements in furtherance of the conspirators' scheme to defraud the public; (5) "Gentlemen's Agreement" with other conspirators to prevent and/or forestall the development and marketing of a potentially less-hazardous cigarette; (6) commission of numerous racketeering acts in furtherance of the conspiracy while the other Defendants were committing parallel racketeering acts in furtherance of the conspiracy; (7) efforts to conceal or suppress information and documents which may have been detrimental to the interests of the members of the conspiracy, including information which could be discoverable in smoking and health liability cases against the Defendants or in Congressional or other governmental proceedings and information that could constitute, or lead

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[6](...continued)
that the defendant agreed would be committed by some member of the conspiracy in furtherance of the conduct of the affairs of the enterprise. Rather, it is sufficient to allege that it was agreed that multiple violations of a specific statutory provision which qualifies as a RICO racketeering offense would be committed, and accordingly the fact finder is not limited to consideration of the specific racketeering acts, if any, specified in the charging instrument. See, e.g., United States v. Glecier, 923 F.2d 496, 499-500 (7th Cir. 1991); United States v. Crockett, 979 F.2d 1204, 1208-09 (7th Cir. 1992); United States v. Phillips, 874 F.2d 123, 125-28 (3d Cir. 1989). Therefore, the United States is not limited to the specific racketeering acts alleged. See also cases cited PCL, pp. 65-66 n.60 and accompanying text.

to, evidence of the link between smoking cigarettes and adverse health effects and addictiveness; and (8) coordination of activities with other Defendants in furtherance of the conspiracy.

2. The United States established that the Defendants, including Liggett, established an association-in-fact Enterprise, consisting of the Defendants and other entities and persons, including agents and employees of the Defendants, and that this Enterprise functioned as a continuing unit to achieve common purposes, including to preserve and enhance their profits from the sale of cigarettes and to avoid adverse liability verdicts in litigation relating to smoking and health issues. In furtherance of these objectives, the Enterprise developed and executed a scheme to defraud the public that was designed to preserve and enhance the market for cigarettes. See PCL, pp. 9-19. It is important to bear in mind that RICO does not require proof that the corporate members of such an association-in-fact enterprise act with criminal intent or purpose; rather, it only requires that, as noted, the members of the enterprise function as a continuing unit to achieve a shared purpose. See United States v. Feldman, 853 F.2d 648, 657 (9th Cir. 1988).

To prove a defendant's knowing participation in a RICO enterprise, the evidence need "not show that every member of the enterprise participated in or knew about all its activities." United States v. Cagnina, 697 F.2d 915, 922 (11th Cir. 1983). Rather, "it is sufficient that the defendant know the general nature of the enterprise and know that the enterprise extends beyond his individual role." Rastelli, 870 F.2d at 828 (collecting cases).[7]

Moreover, the United States is not required to prove that a defendant has "actual control" over the alleged RICO enterprise, as Liggett mistakenly argues. In Reves v. Ernest &

[7] Accord United States v. Tocco, 200 F.3d 401, 425 (6th Cir. 2000); United States v. Eufrasio, 935 F.2d 553, 577 n.29 (3d Cir. 1991); United States v. Hewes, 729 F.2d 1302, 1310-11 (11th Cir. 1984).

Young, 507 U.S. 170 (1993), the Supreme Court held that a defendant is not liable for a substantive RICO violation under 18 U.S.C. § 1962(c) unless the defendant "participate[s] in the operation **or** management of the enterprise itself." Id. at 185 (emphasis added).[8]

> In describing its "operation or management" test, the Supreme Court stated:
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> > Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of § 1962(c) comes into focus. In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," **one must have some part in directing those affairs**.

Id. at 179 (emphasis added).

In Reves, the Supreme Court made clear that a defendant may satisfy this test even if he did not have "actual control" over the enterprise's affairs. For example, the Court stated that "RICO liability is not limited to those with primary responsibility for the enterprise's affairs" and therefore "we disagree with the suggestion of the Court of Appeals for the District of Columbia Circuit that § 1962(c) requires '**significant control** over or within an enterprise.'" Reves, 507 U.S. at 179 & n.4 (citing Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 954 (D.C. Cir. 1990)(en banc)(emphasis in Reves)).

The Court further stated:

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[8] The defendant in Reves, Ernst & Young, provided accounting services to the alleged RICO enterprise, a farmer's cooperative. Thus, the defendant was not an employee or member of the enterprise, but rather was an "outsider" of the enterprise. The plaintiffs alleged that Ernst & Young misled investors by preparing and explaining the cooperative's financial information through a pattern of false and misleading statements. The Court concluded that this tangential nexus to the enterprise was insufficient to impose RICO liability under 18 U.S.C. § 1962(c). Reves, 507 U.S. at 186.

> We agree that liability under § 1962(c) is not limited to upper management, but we disagree that the "operation or management" test is inconsistent with this proposition. An enterprise is "operated" not just by upper management but also by **lower-rung** participants in the enterprise who are under the **direction** of upper management. An enterprise also might be "operated" or "managed" by others "**associated with**" the enterprise who exert control over it as, for example, by bribery.

Reves, 507 U.S. at 184 (emphasis added).

Furthermore, the Court noted that:

> § 1962(c) cannot be interpreted to reach complete "outsiders" because liability depends on showing that the defendants conducted or participated in the conduct of the "enterprise's affairs," not just their own affairs. Of course, "outsiders" may be liable under § 1962(c) if they are "associated with" an enterprise and participate in the conduct of its affairs--that is, participate in the operation or management of the enterprise itself . . . .

Id. at 185.

Following Reves, the federal circuit courts of appeals have made it clear that a defendant need not be among the enterprise's "control group" to be liable for a substantive RICO violation; rather, a defendant need only intentionally perform acts that are related to, and foster, the operation or management of the enterprise. As one court explained: "The terms 'conduct' and 'participate' in the conduct of the affairs of the enterprise include the intentional and deliberate performances of acts, functions, or duties which are related to the operation or management of the enterprise." United States v. Weiner, 3 F.3d 17, 23-24 (1st Cir. 1993).[9]

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[9] See also United States v. Posada-Rios, 158 F.3d 832, 857 (5th Cir. 1998) (finding that Reves does not require that the defendant have decision-making power, only that the defendant "take part in" the operation of the enterprise and holding that the defendant was liable under Reves since he bought multi-kilogram amounts of cocaine from the drug enterprise on a regular basis); United States v. To, 144 F.3d 737, 747 (11th Cir. 1998) (holding that Reves test was satisfied by (continued...)

Likewise, numerous courts have held that Reves is satisfied by evidence that lower-rung members of an enterprise implemented decisions directed by higher-ups in the enterprise or committed racketeering acts, which furthered the integral goals of the enterprise, at the direction of other members of the enterprise. See, e.g., United States v. Parise, 159 F.3d 790, 796 (3d Cir. 1998) (holding that Reves liability extended to an investigator for a law firm who paid kickbacks to union (the enterprise) agents to obtain personal injury cases for the law firm under the direction of the union's president, and noting that "the [Reves] Court made clear that RICO liability may extend to those who do not hold a managerial position within an enterprise, but who do nonetheless knowingly further the illegal aims of the enterprise by carrying out the directives of those in control."), habeas corpus granted on other grounds, 2000 WL 876894 (E.D. Pa. 2000); United States v. Shifman, 124 F.3d 31, 35-36 (1st Cir. 1997) (the defendant "set up" and referred prospective debtors to the leaders of a loanshark enterprise); United States v. Hurley, 63 F.3d 1, 9 (1st Cir. 1995)(the defendants were employees of the enterprise who assisted higher-ups in

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(...continued)
evidence that the defendant planned and carried out a robbery with other members of an Asian crime gang that committed a series of robberies targeting Asian-American business owners and managers); United States v. Houlihan, 92 F.3d 1271, 1298 (1st Cir. 1996)(upholding instruction that jury could find defendant participated in the conduct of the enterprise's affairs even though he had no part in the management or control of enterprise where defendant was an "insider" integral to carrying out enterprise racketeering activity); United States v. Darden, 70 F.3d 1507, 1526, 1542-43 (8th Cir. 1995)(holding Reves was satisfied by evidence that the defendant participated in several murders and murder conspiracies and at least three drug trafficking transactions in an association-in-fact drug enterprise; confirming that the defendant need not participate in control of the enterprise as lower rung participation may satisfy Reves); Napoli v. United States, 32 F.3d 31, 36 (2d Cir. 1994) (Reves test satisfied where evidence that attorneys, although "of counsel" to the law firm enterprise, were not merely providing peripheral advice, but participated in the core activities that constituted the affairs of the firm), reh'g granted, 45 F.3d 680, 683 (2d Cir. 1995)(upholding convictions of law firm investigators who were "lower-rung participants" whose racketeering activities were conducted "under the direction of upper management").

money laundering activities); United States v. Starrett, 55 F.3d 1525, 1548 (11th Cir. 1995)("[W]e agree with the First Circuit that one may be liable under the operation or management test by knowingly implementing decisions, as well as by making them."); United States v. Wong, 40 F.3d 1347, 1371-75 (2d Cir. 1994) (Defendants included low level members of the Green Dragons organized group (the enterprise) who participated in acts of extortion and kidnapping. The court stated "Reves makes it clear that a defendant can act under the direction of superiors in a RICO enterprise and still 'participate' in the operation of the enterprise within the meaning of § 1962(c)."); United States v. Oreto, 37 F.3d 739, 750-753 (1st Cir. 1994)(The defendant participated in the collection of loans by extortionate means on behalf of the loansharking enterprise; the court noted (id. at 750) that "nothing in [Reves] precludes our holding that one may 'take part in' the conduct of an enterprise by knowingly implementing decisions, as well as by making them."). Under the foregoing authority, Liggett participated in the operation **or** management of the Enterprise. See infra, § I.B.

Contrary to Liggett's argument, none of the cases Liggett cites (L. Br. at pp. 20-21) hold that to satisfy the Reves test, the evidence **must establish** that each defendant had "actual control of [the] enterprise." Rather, those cases correctly note that to establish a substantive RICO offense, Reves requires proof that the defendant participated in the "operation or management" of the enterprise, and that lower-rung participants may participate in the "operation **or** management" of the enterprise, even if they lack "actual control" over the enterprise, when they play some role in directing the affairs of the enterprise. See Shams v. Fisher, 107 F. Supp. 2d 266, 274-75 (S.D.N.Y. 2000)(under Reves "[a]n enterprise is 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper

management") (quoting Reves, 507 U.S. at 184); Soanes v. Empire Blue Cross/Blue Shield, 970 F. Supp. 230, 241 (S.D.N.Y. 1997)(the Reves "test attaches liability to those down the 'ladder of operation' who nonetheless played some operational role"); Wiselman v. Oppenheimer & Co. Inc., 835 F. Supp. 1398, 1403 (M.D. Fla. 1993)("entities and individuals outside of an enterprise should not be held liable under section 1962(c) absent some showing of operation or management of the enterprise, or reliable indicia of fraud, coercion or illegality")(internal footnote deleted); id. at 1401 ("Liability is not limited to 'those with primary responsibility for the enterprise's affairs, but some part in directing the enterprise's affairs is required").

Of course, evidence that a defendant had actual control over an enterprise would be sufficient to satisfy the Reves "operation or management" test, but it is not the only means of satisfying it. Any suggestion to the contrary in Economic Dev. v. Arthur Anderson & Co., 924 F. Supp. 449, 466 (S.D.N.Y. 1996) is contrary to Reves itself and to controlling Second Circuit decisions and therefore is not the law in the Second Circuit. See, e.g., United States v. Diaz, 176 F.3d 52, 92 (2d Cir. 1999)("Under the Reves operation-management test, even if a defendant is not acting in a managerial role, we have held that he can still be liable for directing the enterprise's affairs if he 'exercised broad discretion' in carrying out the instructions of his principal" (citing Napoli v. United States, 45 F.3d 680, 683 (2d Cir. 1995)); United States v. Allen, 155 F.3d 35, 42 (2d Cir. 1998)("the commission of crimes by lower level employees of a RICO enterprise may be found to indicate participation in the operation or management of the enterprise"). See also United States v. Workman, 80 F.3d 688, 698 (2d Cir. 1996); Wong, 40 F.3d at 1374.

In any event, Liggett exercised significant control over the affairs of the Enterprise through its funding and control over various components of the Enterprise and its causing the public dissemination of numerous false, deceptive or misleading statements that constituted core activities of the Enterprise. See infra § I.B.

B. Liggett Participated in the RICO Enterprise and Conspiracy

1. Liggett's Participation in Components of the Enterprise

Liggett's position in the RICO conspiracy and in the Enterprise is thoroughly evidenced by its membership in various organizations, as well as its participation in other groups, committees, conferences, and entities that Liggett and other Defendants used to further the objectives of the RICO conspiracy and Enterprise. For instance, Liggett was a member of CTR from 1964 to 1969; and even after its formal membership ceased, contributed to CTR's Special Projects fund from 1966 through 1975 and to CTR's Literature Retrieval Division from 1971 through 1983. See PFF I, ¶ 25 & Appendix Tables B & C. Liggett paid over $700,000 into CTR's General Fund; approximately another $144,000 into CTR's Special Projects Fund; and over $600,000 into CTR's Literature Retrieval Division. PFF § I ¶¶ 26-28 & Appx. Tables A-C.

Contrary to Liggett's claim in its brief that it "was not involved in the formation or management of either" TI or CTR (L. Br. at 5), the evidence plainly shows that Liggett, along with Defendants American Tobacco, Brown & Williamson, Lorillard, R.J. Reynolds, Philip Morris, and other companies, was also a founding member of the Tobacco Institute in January 1958, and Liggett's President, Benjamin Few, sat on TI's first Board of Directors. PFF § I, ¶¶ 71, 73; see also PFF § I, ¶ 97. Over the course of its membership from 1958 until 1996, Liggett contributed over $1.8 million to the Tobacco Institute, (PFF § I ¶ 75), while it performed

significant acts in furtherance of the RICO conspiracy and Enterprise. See PFF § I.C and § IV; see also Racketeering Acts 3, 5-7, 10, 12, 18, 21, 23-24, 27, 29, 33-35, 42-43, 46, 49, 56, 79, 81, 87, 91, 93, 117-118, 130, 132-133. Along with the other Cigarette Company Defendants, Liggett sat on various TI committees, including the Tobacco Institute Committee of Counsel. PFF § I, ¶¶ 81- 87. Among other things, this committee discussed and coordinated Defendants' activities with respect to smoking and health matters, witness development issues, cigarette advertising, document handling and retention issues, and product liability litigation that was pending against the Defendants. Id.

One TI Committee of Counsel document produced from Liggett's files is particularly telling. Subsequent to one meeting, a member of the Committee circulated a memorandum proposing to sponsor a consumer survey to look for awareness of smoking and health issues, noting that if the survey comes out favorable, "it is possible that this information could be of significance to the industry both for its Congressional presentation and for other purposes. If, for example, we are able to establish that the American consumer overestimates the risks of habitual smoking, the case for warning or labeling would be weakened." The memo continues to discuss how to "skew" the results by eliminating questions that "might upset an otherwise favorable return." However, most importantly:

> the question has been raised of possible adverse use of a survey. Specifically, M. Austern has suggested that should the results of the survey prove unfavorable, they may be subpoenaed or otherwise may fall into the hands of the FTC, a congressional Committee, or a plaintiff in pending cancer litigation. There is no question that some risk exists. We have been assured by both Elrich & Lavidge and by Professor Steiner that they would transmit to us every interview and every copy of the analysis. **Thus, when it is completed, there will be nothing in the records of Elrich & Lavidge or Professor Steiner to subpoena. The danger of a successful subpoena would be reduced (though not entirely eliminated) if**

> **the survey were in an attorney's files. In any event, if the returns were unfavorable they could be destroyed and there would be no record in any office of the nature of the returns.**

(emphasis added; LG2006318 (MN Trial Exh. 21,483)).

Liggett was also involved in the Tobacco Institute Testing Laboratory. PFF § I, ¶¶ 163; ¶ 166 (acknowledging that TITL was a "Mechanism for Mutual Cooperation."). Likewise, Liggett joined the other Cigarette Company Defendants in various joint research projects, such as projects relating to the testing of Chemosol at Hazleton Laboratories. PFF § I, ¶¶ 170, 172.

Also, as further detailed in the United States' Proposed Findings of Fact, Liggett, along with the rest of the Cigarette Company Defendants, orchestrated a variety of research projects and witness development programs dubbed Special Projects. These projects took numerous forms, including as CTR Special Projects, Lawyers' Special Projects (projects paid through Special Accounts), and special projects conducted through the Tobacco Institute. These projects were all exclusively funded by these Defendants. PFF § I, ¶¶ 180-183. CTR Special Projects served to promote research projects to support Defendants' product liability concerns, without the need for clearance by scientific review by the CTR Scientific Advisory Board. PFF § I.E. Such arrangements furthered the objectives of the Enterprise and conspiracy by furthering Defendants' fraudulent positions regarding smoking and health, (see PFF § I, ¶¶ 184-85 (CTR Special Projects used to circumvent CTR SAB funding by vetting research through attorneys rather than scientists)), while also shielding Defendants from potential liability by keeping certain potentially controversial research under the auspices of attorneys. See, e.g., PFF § I ¶ 186 (November 18, 1965 internal Liggett memo by Frederick Haas, Liggett's General Counsel, discussing some of the planned processes for CTR Special Projects as a means of circumventing

SAB approval process); PFF § I ¶ 188; PFF § I ¶ 190 (Liggett attorney Francis Decker letter to Liggett Vice President and General Counsel relating notes concerning Committee of Counsel and Special Projects research); PFF § I, ¶¶ 191, 193, 195, 196, 197 (Shook Hardy & Bacon letters to Committee of Counsel, including Liggett General Counsel, apprising Committee of Special Projects); PFF § I, ¶ 200, 213 (letters from Defendants' General Counsels advising Shook Hardy & Bacon as to whether or not the Defendants, including Liggett, would agree to sponsor the CTR Special Projects); ¶ 214 (February 28, 1974 letter from Frederick Haas, General Counsel for Liggett, to Shook Hardy & Bacon advising of Liggett's agreement to fund Dr. Carl Seltzer).

In addition to CTR Special Projects, various Defendants, including Liggett, also conducted special research projects under the guidance of the Ad Hoc Committee, PFF § I ¶ 228, a group of retained litigation counsel and other agents of Defendants appointed to coordinate tobacco industry activity with respect to research. See also PFF § I ¶ 229 (discussing the Ad Hoc Committee); PFF § I ¶ 190 (Liggett attorney's notes relating discussion that for Lawyer's Special Projects, "we wanted to protect it under the lawyers. We did not want it out in the open."). Members of the Ad Hoc Committee, including Liggett, contributed to Special Account No. 4, which was used for lawyers' Special Project funding, consultancy fees, and witness expenses. PFF § I, ¶ 231.

A January 15, 1975 memo from Frederick Haas, Liggett's General Counsel, to Arthur Sloat, President of Liggett, describes how Defendants used Special Account No. 3 and Special Account No. 4: "Account #3 is the central file available to company and litigating counsel. . . . It is separated from Account #4 because we have considered it to be lawyers' work product, and, therefore, not subject to subpoena. Account #4 is utilized to obtain the services of doctors and

scientists who could be available for Congressional hearings, litigation, etc." He further stated: "I and other lawyers who have for several decades been close to the litigation aspects of smoking and heath have consistently found that the work done from the funds generated from the above accounts have been extremely important in defending lung cancer and related cases." PFF § I, ¶ 232; ¶ 420. See also PFF § I, ¶ 235 (Shook Hardy & Bacon memo to Defendants' in-house counsel, including Liggett, regarding Special Account No. 4); ¶ 238 (joint-funded consultancies and other research projects through Special Accounts); ¶¶ 239- 240 (other Special Account Projects); PFF § I, ¶ 247 (Liggett's quarterly contribution to Special Account No. 4); PFF § I, ¶¶ 274-277, 281-82 (witness development through Special Account No. 4). Similarly, outside the auspices of Special Accounts, Liggett and its codefendants arranged institutional grants to promote similar, self-serving research, PFF § I, ¶¶ 249-251, and sponsored scientists through multiple sources and funding mechanisms. PFF § I, ¶¶ 252-254.

As set forth in the United States' Preliminary Proposed Findings of Fact, see PFF § I.E.(1), the Cigarette Company Defendants, including Liggett, operated special projects through TI in furtherance of the affairs of the Enterprise and the scheme to defraud. PFF § I, ¶¶ 259-263. For instance, in February 1969, the General Counsel for various Defendants, including Liggett, gave approval as a Tobacco Institute Special Project for the running of a copy of Dr. Clarence Cook Little's (CTR's Scientific Director) press release of February 3, 1969 with a headline declaring "How Much is Known about Smoking and Health" for publication in major newspapers and medical journals across the country. PFF § I, ¶ 263.

Although it refrained from formal membership in the Committee for Indoor Air Research ("CIAR"), one of Defendants' organizations to promulgate false and misleading statements

regarding environmental tobacco smoke, Liggett nonetheless remained involved in CIAR's activities and meetings. Liggett participated in meetings involving the organization of CIAR. For example, the formation of and financing for CIAR were discussed at meetings of the Tobacco Institute Executive Committee on June 18, 1987 and August 20, 1987, at which committee member Kinsley R. Dey of Liggett was present.[10] Also, on January 19, 1993, Dr. Dennis Dietz, Manager of Scientific Issues for Liggett, attended a CIAR meeting in London, which was also attended by scientific personnel from other tobacco companies, including Philip Morris, Lorillard, R.J. Reynolds, BAT, and Brown & Williamson. According to notes of the meeting, "attendees seemed cautiously interested in a collaborative approach such as CIAR to proactively address the ETS issue with good, solid science." Also at that meeting, the attendees reviewed several "major on-going or planned" studies sponsored by CIAR.[11]

Liggett was also a member of various other committees and entities, in cooperation with the other Defendants and in furtherance of the affairs of the Enterprise. Such organizations included the Research Review Committee/Research Liaison Committee (PFF § I, ¶ 333-344), which reviewed industry and non-industry research and discussed proposals for research projects, funding priorities, and similar issues; the Industry Technical Committee (PFF § I, ¶ 345-348) which discussed, among other things, how CTR might become a better instrument for the good of the tobacco industry; and the Centre for Cooperation in Scientific Research Relative to Tobacco ("CORESTA") (PFF § I, ¶¶ 391, 393) which served as a forum for industry cooperation on smoking and health issues, scientific matters, coordinating industry positions, and for internal

[10] Bates Nos. 2023723951-3955; 25856068-6073

[11] Bates Nos. 2023053733; 89259462-9465

resolution of inter-defendant disputes; and had various interactions with other international committees. See, e.g., PFF § I, ¶ 402.

2. Coordinated Smoking and Health Literature Collection and Retrieval

The Enterprise had as its purpose not only to defraud the public by preserving and enhancing the market for cigarettes, but also to avoid adverse liability findings that could result in large damage awards as well as increased public recognition of the harmful effects of smoking. In furtherance of this latter purpose, Defendants collectively gathered, organized, stored, and eventually automated medical and scientific literature related to smoking and health research for this common purpose. Defendants therefore created collections of documents, research, and other information, which was named, at times, the Central File, and in 1971 the Board of CTR voted to incorporate the operations of a company called 3i (Information Interscience Incorporated) into CTR, designating it a special project for a time under the name Information Systems, which was later changed to the Information Retrieval Division, and later the Literature Retrieval Division ("LRD"). The LRD and its predecessors served all of the Cigarette Company Defendants, including Liggett, and their attorneys in the defense of smoking and health litigation. PFF § I, ¶¶ 409-419.

3. Document Destruction and Concealment

Moreover, as detailed throughout Section I of the United States' Proposed Findings of Fact, various Defendants, including Liggett, have been involved in concealing, destroying, and otherwise suppressing material information to avoid their discovery in smoking-and-health litigation over the past forty-five years.

As noted in PFF § I.K, Liggett created mechanisms by which improper and false attorney-client privilege or work product protection were invoked for non-privileged documents not created in anticipation of litigation, including scientific and research documents, to prevent the disclosure of documents which would likely be (and have been) sought in litigation and in regulatory proceedings and would provide information to the public on the adverse impact of smoking on health. PFF § I, ¶ 514. In 1978, Liggett began its significant efforts to hide documents related to Project XA, including research documents, behind the attorney-client privilege. Despite the scientific nature of the project and the fact that the project was "under the direct responsibility of the President's Office," Joseph H. Greer, Liggett's General Counsel, ordered that all documents regarding the project be funneled to him or a legal department staff member. To enhance the potential for hiding the documents behind the attorney-client privilege, the project was placed under Legal Department control. PFF § I, ¶ 515. In 1979, Liggett's attempt to conceal these records became even more clear when a Liggett Vice President, R.B. Seidensticker, followed up on Greer's earlier directive related to Project XA, ordering every XA document, "be it financial, scientific, production or marketing," transferred to Liggett's Law Department. PFF § I, ¶ 516.

Contrary to Liggett's claims that its conduct has changed, during the 1990s, Liggett scientists were directed to label their work as privileged and confidential in order to prevent its discovery in civil litigation. As stated by Liggett's Manager of Science Issues, "we had become sensitized to labeling a lot of documents privileged and confidence [sic] without thinking[,] it was kind of just a matter of fact thing to do. . . . [M]ost of the documents that we put out, I think, are always subject to discovery. And not knowing exactly where – where this was gonna go, it

was just considered almost standard practice to do that." PFF § I, ¶ 517.

Indeed, contrary to Liggett's self-congratulatory statements that it "provided important and valuable assistance" to various state attorneys general, "including the production of privileged documents," (L. Br. at 7), other courts have found (along with other Defendants) that Liggett's conduct has furthered Defendants' scheme to defraud and conspiracy. See, e.g., PFF § I, ¶ 497 (Sackman v. Liggett Group, Inc., 173 F.R.D. 358, 362-364 (E.D.N.Y. 1997) (attempts by Liggett, Philip Morris, Brown & Williamson, R.J. Reynolds, Lorillard, and CTR to designate CTR Special Project documents as privileged was inappropriate); PFF § I, ¶ 500 (Haines v. Liggett Group, Inc. 140 F.R.D. 681, 689 (D.N.J. 1992), vacated on procedural grounds, 975 F.2d 81 (3rd Cir. 1992) (following an in camera review of 1,500 documents, confirmed "plaintiff's contentions of the explicit and pervasive nature of the alleged fraud by defendants [Liggett, Lorillard, R.J. Reynolds, Philip Morris, and the Tobacco Institute] and defendants' abuse of the attorney-client privilege as a means of effectuating that fraud." Specifically, the court found "that the attorney-client privilege was intentionally employed to guard against . . . unwanted disclosure," and defendants and their lawyers "abused the attorney-client privilege in their efforts to effectuate their allegedly fraudulent schemes." Id. at 694-95). See also PFF § I, ¶ 494 (State of Florida v. American Tobacco Co., Civ. Action No. CL 95-1466 AH (Palm Beach Cty., Fla., filed Feb. 21, 1995) (upholding special master's ruling that lawyers for Defendants American, R.J. Reynolds, Brown & Williamson, BATCo, Philip Morris, Liggett, Lorillard, CTR, and the Tobacco Institute "undertook to misuse the attorney/client relationship to keep secret research and other activities related to the true health dangers of smoking."); PFF § I, ¶ 496 (State of Washington v. American Tobacco Co., Inc., et al., No. 96-2-15056-8 SEA (King Cty. Sup. Ct.

1998) (several rulings in which the court determined that numerous documents for which Defendants American, Brown & Williamson, Liggett, Lorillard, Philip Morris, R.J. Reynolds, CTR, and the Tobacco Institute had asserted privilege were subject to the crime/fraud exception and were therefore "de-privileged." The bases for the findings included "that defendants attempted to misuse legal privileges to hide research documents"; "that attorneys controlled corporate research and/or supported the results of research regarding smoking and health"; "that the industry, contrary to its public statements, was suppressing information about smoking and health"; "that CTR was neither created nor used to discover and disseminate the 'truth,' contrary to defendants' representations to the public"; "that Special Account #4 was used to conceal problematic research"; and "that CTR and the SAB [Scientific Advisory Board] were not independent and that the industry's use of CTR was misleading to the public.").

Indeed, in this litigation, Liggett has failed to comply with the orders of the Court in accounting for its documents which it withholds on the basis of privilege, and instead has engaged in deceptive, misleading conduct in accounting for, or failing to account for, its documents. For instance, Liggett has provided misleading–as well as affirmatively false–descriptors in its privilege logs that it has provided to the United States and the Special Master in this case. See, e.g., Vol. 1 (Revised) of Liggett's Comprehensive Privilege Logs. Further, the United States has learned recently that several documents have been logged as privileged on Liggett's privilege logs in this litigation that the company released in other litigations as part of its settlement agreements. Liggett is withholding these documents despite its express representations to the Court and Special Master that it would not do so, see Special Master Report and Recommendation No. 19, at 2, and despite the fact that Liggett touts the release of the

documents in prior litigations as evidence that it is a reformed corporate citizen in its Preliminary Findings of Fact. L. Br. at 7 & 10-11. Such conduct, much like the suppression of research and other information in other litigations, furthers, rather than frustrates, the goals of the Enterprise and the conspiracy.

4. The Scheme to Defraud

In addition to the evidence summarized above, and as detailed more fully in the United States' PFF § IV, Liggett was (and remains) a principal participant in the Enterprise's scheme to defraud the public, and to preserve and maintain the market for cigarettes.

a. Health Effects of Smoking/Open Question/ETS

As noted in Section I. B.1 supra, and in the United States' PFF (§ I.A) Liggett and the other Cigarette Company Defendants jointly participated in the activities of the Council for Tobacco Research, which funded irrelevant, self-interested research, contrary to Defendants' public representations and other promises to perform disinterested research to discover the adverse health effects of smoking. See PFF § IV.F; see also PFF § I.A ¶ 29 (March 1964 press release announcing renaming of TIRC into CTR, announcing Liggett's joining CTR, touting TIRC's "steady expansion in our program of scientific research into tobacco use and health ...."); cf. PFF § I.A ¶ 242 (noting that Liggett scientists in 1964 believed CTR to be "largely without value"); see also PFF § I.A ¶ 202 (February 1969 approval by General Counsel for Philip Morris, R.J. Reynolds, Brown & Williamson, Lorillard, and Liggett, members of the Committee of Counsel, approved as a special project the running of a copy of the foregoing press release entitled "How Much is Known about Smoking and Health" which was disseminated throughout the country) . Likewise, Liggett was a founding member of the Tobacco Institute, which

disseminated thousands of false and misleading public statements related to smoking and health, nicotine and addiction, and Defendants' false representations that they did not target youths.

Despite its public denials and insistence that the case was "not yet proven," Liggett was well aware of the adverse health consequences of smoking. For instance, Liggett, along with B&W, Lorillard, R.J. Reynolds, and Philip Morris, founded the Harvard Research Tobacco and Health Program, with Dr. Gary Huber as the head of the program. Huber reported to the Defendants that his research demonstrated a response to inhaled cigarette smoke, including disease mechanisms similar to those associated with human disease, and changes in animal lungs analogous to human disease. PFF § IV.A ¶¶ 268-270. Similarly, Liggett and the other Defendants reviewed outside research that confirmed that smoke constituents were carcinogenic. See, e.g., PFF § IV.A ¶ 261.

Indeed, Liggett, and its contract research firm, Arthur D. Little, was aware of the cancer causing potential of cigarettes by 1961. See, e.g. PFF § IV.A ¶111-112. A Liggett document prepared by A.D. Little in 1961 maintained, among other things, that "[t]here are biologically active materials present in cigarette tobacco. These are: a) cancer causing b) cancer promoting c) poisonous d) stimulating, pleasurable, and flavorful." PFF § IV.A ¶ 111.

Despite such internal knowledge, Liggett, along with the other Defendants, publicly maintained that the link between smoking and health was still an "open question." See, e.g., Racketeering Acts 3, 5, 7, 10, 12, 18, 21, 23-24, 27, 29, 33, 42, 43, 46 (TI press releases). Even as late as April 1994, Liggett's representative Ed Horrigan testified to the Subcommittee on Health and Environment that smoking had not been conclusively proven to be hazardous. PFF § IV.A ¶ 335.

Bennett LeBow, Liggett's former Chief Executive Officer and the present controlling shareholder and Chief Executive Officer of its parent company, has also given sworn testimony that benefitted the conspiracy and carried out its goals. In 1993, LeBow testified that it was unknown whether cigarettes caused lung cancer and other serious health problems, and that he believed cigarettes were not addictive. LeBow has since admitted that his 1993 testimony was not guided by his own knowledge, but rather was guided by instructions from his lawyers at that time, who educated him about the positions of the industry as a whole and instructed him to testify consistent with the industry "party line."[12]

Similarly, relating to Defendants' concerted efforts to deny the hazards of environmental tobacco smoke for both smokers and nonsmokers, Liggett contributed funding to the ETS Advisory Committee (also known as the "Hoel Committee"), and met with other members of the Tobacco Institute Executive Committee to discuss "a research organization to deal with issues relating to indoor air quality." PFF § IV.A ¶ 362, 366. That entity, the Council for Indoor Air Research, sponsored numerous misleading studies and other self-interested research, and disseminated several false and misleading statements relating to ETS. Though never formally a member of CIAR, Liggett nevertheless attended CIAR meetings both in the United States and overseas, and otherwise participated in the organization. See supra pp. 17-18.

Likewise, in 1973, CTR's agent Don Hoel (an attorney for Shook, Hardy & Bacon) sent a letter to Defendants Philip Morris, Reynolds, B&W, Lorillard, American, and Liggett, recommending approval to fund research by Dr. Richard J. Hickey as a CTR Special Project for

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[12]Bennett S. LeBow, State of Washington v. American Tobacco Co., No. 96-2-15056, October 13, 1998, at 2280-2282.

two years, beginning September 1973, and cites Hickey's efforts to show that air pollution is primarily responsible for many chronic diseases attributed to smoking. See Racketeering Act 31; see also Racketeering Act 42 (fraudulent TI press release regarding environmental tobacco smoke).

b. Addiction and Nicotine Manipulation

Liggett's fraudulent conduct and statements extended to Defendants' statements concerning nicotine and addiction, and Defendants' manipulation of nicotine delivery. As with the other Defendants, Liggett was well aware that nicotine is addictive, and, as reported by its sponored researcher, Dr. Gary Huber, smokers "smoked for nicotine." PFF § IV.B ¶ 617.

Indeed, Liggett, like its co-defendants, engaged in extensive research to determine the optimum delivery of nicotine to establish and sustain addiction. For instance, in a joint research project with Philip Morris, Reynolds, and American, Liggett sought to determine if genetically different tobacco varieties differed in relative "nicotine-to-tar" ratios. PFF § IV.B ¶ 614. Liggett not only knew about smoker "compensation," but met with other Defendants to discuss smoking behavior, including compensation. PFF § IV.C ¶¶ 742-43. Minutes from the meeting demonstrate that these defendants knew that an "individual smoker's smoking behavior pattern," which included changes in smoking behavior such as smoker compensation, was the "principal determinate of exposure" to the harmful substances in tobacco smoke. PFF § IV.C ¶ 744.

Liggett also had projects to alter the ratio of nicotine to tar. In 1970, Liggett changed the tobacco blends of at least six brands which resulted in an increased ratio of nicotine to tar in several of those brands. PFF § IV.C ¶ 724. In 1978, Liggett researched creating "Cigarettes with Elevated Nicotine." As part of this research, Liggett created test cigarettes using the additive

nicotine malate to alter the nicotine-to-tar ratio. PFF § IV.C ¶ 726; see also PFF § IV.C ¶ 725.

Liggett also aggressively pursued designing a cigarette with increased smoke pH called project TE-5001. That project proposed to increase "the pH of a medium in which nicotine is delivered increases the physiological effect of the nicotine by increasing the ratio of free base to acid salt form, the free base form being more readily transported across physiological membranes." The importance of this finding was explained: "[w]e are pursuing this project with the eventual goal of lowering the total nicotine present in smoke while increasing the physiological effect of the nicotine which is present, so that no physiological effect is lost on nicotine reduction," and noted that it was able "to achieve a higher physiologic effect from the nicotine in the smoke." PFF § IV.C ¶ 803-804. A later report discussed various methods, including filters, blends, and additives, by which the smoke pH could be altered, and noted that these "increased smoke pH cigarettes generally exhibited an increased physiological impact." PFF § IV.C ¶ 805. Through this work and other research, the company was aware of various methods of altering pH for enhanced nicotine delivery by 1976. PFF § IV.C ¶ 806-807; see also PFF § IV.C ¶ 808.

Despite this internal knowledge, as well as the research that Liggett and its codefendants had at their disposal, and in addition to Liggett's use of this knowledge to develop highly addictive products, Liggett furthered the scheme to defraud by denying that nicotine was addictive and by denying that it manipulated nicotine. For instance, through the Tobacco Institute, Liggett and the other Cigarette Company Defendants issued many public statements fraudulently denying the addictiveness of cigarette smoking and the companies' manipulation of nicotine and nicotine delivery. See PFF § I ¶¶ 145-149; see also PFF § V.B ¶ 15 (Racketeering

Act 15, relating to letter from William Shinn, as agent for Liggett and certain other Defendants, discussing a research proposal that stress, rather than addiction, explains why smoking clinics fail and proposing to publicize the "image of smoking as 'right' for many people . . . as a scientifically approved 'diversion' to avoid disease causing stress."); ¶¶ 49, 56 (TI Press statement disputing addictiveness), 79, 81, 132-133.

Moreover, on April 14, 1994, the Chairman and Chief Executive Officer of the Liggett Group, Inc., Edward A. Horrigan, testified under penalty of perjury in a hearing before the House Subcommittee on Health and the Environment, which was televised nationwide. During this hearing, Horrigan–joining ranks with Defendants Lorillard, Philip Morris, Reynolds, American, and Brown & Williamson–affirmatively denied that nicotine is addictive:

> Rep. Ron Wyden: Let me ask you . . . . Do you believe that nicotine is not addictive?
>
> Mr. Horrigan: I believe nicotine is not addictive.

PFF § IV.B ¶ 508. Similarly, and also in line with the above-named Defendants, Mr. Horrigan fraudulently denied that Liggett manipulates the amount of nicotine contained in cigarettes. PFF § IV.C ¶ 844.

c. Concerted Efforts to Suppress Development of a Potentially Less-Hazardous Cigarette

As discussed in Section IV.G of the United States' Proposed Findings of Fact, all of the Cigarette Company Defendants (except Philip Morris Companies) participated in a "Gentlemen's Agreement" to avoid and suppress the development and/or marketing of a potentially less-hazardous cigarette, for fear that such a development would effectively indict all "regular" cigarettes as hazardous, and also put the lie to Defendants' fraudulent position that such

cigarettes were not unsafe.

In the late 1950s, Liggett discovered that hydrogen cyanide in cigarette smoke produced ciliastasis in the lung, which prevented the lung from clearing toxic substances. PFF § IV.G ¶ 2387. In 1962, Liggett developed a charcoal-like filter that might have reduced the hydrogen cyanide output of the cigarette, and later (in 1963) began marketing the Lark cigarette, some lines of which contained this charcoal filter. PFF § IV.G ¶ 2388. Nevertheless, Liggett refused to finance or otherwise sponsor a long-term study called for by members of the public health community that would compare different smokers and determine whether the filters were, in fact, safer. PFF § IV.G ¶ 2389.

Similarly, with Project XA, Liggett in the 1970s and 1980s developed a new cigarette product that it believed to be less hazardous for smokers, but later cancelled its plans to market the product, despite over twelve years of research and millions of dollars invested. Internal research indicated that Liggett believed that the XA product might very well be less hazardous. PFF § IV.G ¶ 2393-94. Nevertheless, Liggett's outside counsel and in-house General Counsel, Joseph Greer, feared that such a development might threaten Defendants' litigation position that "regular" cigarettes were not unsafe. Greer and Liggett's outside counsel prevented certain biologic testing results relating to XA from being published or otherwise publicly disclosed. PFF § IV.G ¶ 2396-97.

This effort to suppress the development, publicity, and marketing of XA did not occur in a vacuum, but instead were part and parcel of Defendants' "Gentlemen's Agreement." Indeed, the evidence shows that various other Defendants, including Philip Morris (PFF § IV.G ¶ 2402) and Brown & Williamson (PFF § IV.G ¶ 2403) sought to enforce this agreement by, among other

things, threatening Liggett's "very existence" by excluding Liggett from joint defense agreements. According to extensive testimony, these other companies, like certain representatives within Liggett itself, were concerned that, if XA were marketed, this would be a tacit admission that other cigarettes were unsafe.

To close the loop, and further prevent that tacit admission, much of the information regarding XA has been suppressed. Liggett staffed every project XA meeting with an attorney, and former XA scientists were instructed by counsel that all of the information obtained in the laboratory was to be considered privileged. PFF § IV.G ¶ 2401. Liggett's in-house counsel issued an opinion letter circulated throughout Liggett upper management, and indicating that the other Defendants' threats to Liggett should not be disclosed. PFF § IV.G ¶ 2404.

d. "Light" Cigarettes

Rather than developing and marketing a potentially less-hazardous cigarette, Liggett, like the other Cigarette Company Defendants, chose to market (and still markets) "low-tar/low-nicotine" cigarettes, also known as "light" cigarettes. Liggett also marketed these cigarettes with misleading advertisements to exploit smokers' desires for "health reassurance" products. PFF § IV.D ¶ 872. Liggett knew that consumers were concerned about the health consequences of smoking. See, e.g., PFF § IV.D 1094. Like the other Cigarette Company Defendants, Liggett knew (and knows) that consumers believe such products to be safer than regular cigarettes, and indeed "light" cigarettes often "intercept" potential quitters and allow smokers and potential smokers to believe that they are minimizing the health hazards of smoking. See PFF § IV.D ¶¶ 1068, 1132. Liggett, like its coconspirators, marketed such products in the hopes of retaining smokers, and in furtherance of the Enterprise's goal to preserve and enhance the market for

cigarettes.

Liggett also knew, and knows, that such cigarettes are no healthier than are regular cigarettes. For instance, in May 1968, Liggett hosted a meeting with research scientists from Philip Morris, R.J. Reynolds, and Brown & Williamson, as well as an attorney from Covington & Burling, to discuss the FTC Method. At the meeting, the Defendants internally recognized that any claim that lower FTC tar and nicotine yields resulted in lowered exposure to smokers was unsubstantiated: "We expect to be able to show that FTC Tar and Nicotine are of limited or questionable value as a measure of potential exposure to the smoker. . . . [T]he principal determinate of exposure is the individual smoker's smoking behavior pattern." PFF § IV.D ¶ 877; see also PFF § IV.D ¶¶ 904, 1000.

e. Youth Marketing

Like the other Cigarette Company Defendants, Liggett denied that it targeted the youth market or intended its advertising and marketing to appeal to youths. For instance, on May 18, 1979, Raymond J. Mulligan, then President of Liggett, sent a letter to Joseph A. Califano, Jr., Secretary of the Department of Health, Education and Welfare, in response to an April 26, 1979 letter sent by Califano which identified that millions of children are regular cigarette smokers and urged Liggett to dedicate a percentage of its advertising budget to youth smoking prevention programs. Mulligan stated that "this Company does not promote or advertise its cigarette products to children or young people under twenty-one years of age, nor are our promotional activities and advertising aimed at encouraging such children and young people to begin smoking or even continue smoking." Mulligan's letter further stated, "Cigarette smoking is an adult pleasure and custom" and referred to industry policies aimed at "limiting the pleasure of smoking

to adults." PFF § IV.E ¶ 1273.

Similarly, Liggett, along with the other Cigarette Company Defendants, touted the Advertising Code as their "voluntary" agreement to prevent them from marketing to youth. See, e.g., PFF § IV.E ¶ 1318. As detailed in the United States' Preliminary Proposed Findings of Fact, this promulgation of the Code, along with Defendants' repeated invocation of the Code in their fraudulent assurances that they did not target the youth market, furthered the scheme to defraud and the affairs of the Enterprise, as it was nothing more than a public relations ploy by the Defendants to mislead the public about Defendants' efforts relating to the youth market. See PFF § IV.E.(2).

Finally, through the Tobacco Institute, Liggett and the other Cigarette Company Defendants made various fraudulent statements falsely denying that they targeted youths in their advertising and marketing. See, e.g., PFF § I ¶¶ 150-161 (¶ 154: (TI spokesperson stating on national television: "Cigarette manufacturers are not interested in obtaining new business from teenagers. . . . We do everything possible to discourage teenage smoking.")).

Such statements were clearly false and misleading. Liggett, like the other Cigarette Company Defendants, was well aware of the import of the youth market, and designed its advertising and marketing to appeal to youths. For instance, Liggett's Chesterfield advertisements portrayed cowboys smoking Chesterfields.[13] Another featured a group of young individuals on a beach, with surfboards and rafts, and in the foreground a cartoon king and lion

[13]http://tobaccodocuments.org/pollay_ads/Ches01.17.html (1958 advertisement); Liggett. "They Satisfy". 23 Jan 1956., Life, vol. 40, no.4; http://tobaccodocuments.org/pollay_ads/Ches.16.12.html (Featuring actor James Arness of Gunsmoke fame).

touted Chesterfield Kings.[14] Liggett marketed various Christmas editions of its brands, including Oasis, which featured Santa Claus on its carton.[15]

Another series of advertisements, for Liggett's L&M brand, featured Zoltan the Gypsy Chief, a cartoon character. Zoltan discovered "that every puff of an L&M taste [was] as good as the first."[16] A colorized version of the "Zoltan the Gypsy Chief" resurfaced in 1969.[17] Other advertisements featured parachutists,[18] race car drivers,[19] and people playing on the beach.[20]

Liggett also engaged in various couponing[21] and promotional marketing tactics, offering such items as purses, bags, belts, women's clothing, and even barbecue accessories.[22] See also

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[14]Liggett. "Like Your Pleasure Big?". 1957. http://tobaccodocuments.org/pollay_ads/Ches14.20.html.

[15]Liggett. "Best to give-best to get!". 1958. http://tobaccodocuments.org/pollay_ads/Mult01.04.html.

[16]Liggett. "Zoltan the Gypsy Chief discovers that every puff of an L&M taste as good as the first.". 1963. http://tobaccodocuments.org/pollay_ads/L_M05.12.html.

[17]Liggett. "Zoltan the Gypsy Chief discovers that every puff of an L&M tastes as good as the first.". 1969. http://tobaccodocuments.org/pollay_ads/L_M04.15.html.

[18]Liggett. "This ... is the L&M moment.". 1972. http://tobaccodocuments.org/pollay_ads/L_M03.17.html.

[19]Liggett. "This . . . is the L&M moment.". 1972. On TDO: http://tobaccodocuments.org/pollay_ads/L_M04.10a.html.

[20]Liggett. "Put some more flavor in your life". 14 Jul 1972. http://tobaccodocuments.org/pollay_ads/Lark03.12.html.

[21]Liggett. "Does your cigarette wear out as the day wears on?". 1993. http://tobaccodocuments.org/pollay_ads/Lark01.17.html. Liggett. "TAKE THE LARK CHALLENGE!". 1992. http://tobaccodocuments.org/pollay_ads/Lark01.04.html.

[22]Liggett. "Relax with a FREE pack of Eve.". 1991. http://tobaccodocuments.org/pollay_ads/Eve_01.07.html. See also Liggett. "The Eve Bag and Belt Embroidery Kit. A pretty

(continued...)

PFF § IV.E ¶ 1848 (Liggett's current "buy one get one free" and sampling practices).

Only by September 1997, in a deposition during the State of Minnesota litigation, did Liggett's then-CEO, Bennett LeBow, confirm that the Cigarette Company Defendants targeted young people with their advertising and marketing. LeBow testified that the purpose of targeting young people was "to try to keep people smoking, keep their [cigarette] business going," because, if young people did not start smoking, the Cigarette Company Defendants would "have no business in this generation." LeBow also indicated that his attorneys told him that they found some Liggett documents that indicated that Liggett cigarette marketing had been targeted at the young. PFF § IV.E ¶ 1508.

Even after this admission, Liggett's youth-marketing activities, like those of the other Defendants, have continued, see, e.g., PFF § IV.E ¶ 1848, ¶ 1897, and Liggett's current youth designee on MSA youth smoking issues could not say whether Liggett has done anything to change its marketing practices in light of the MSA restrictions. PFF § IV.E, ¶ 1896. Moreover, Liggett does nothing to determine whether its current marketing practices attract youths. See, e.g., PFF § IV.E ¶ 1510.

f. Myth of Independent Research

Finally, Liggett, along with the other Defendants, publicly promised to seek disinterested, objective information into the causes of adverse health effects associated with smoking. Although it was not an initial member of TIRC/CTR, Liggett joined that organization in 1964,

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[22](...continued)
offer from a pretty cigarette.". 1974. http://tobaccodocuments.org/pollay_ads/Eve_02.13b.html. (offering "a pretty offer from a pretty cigarette" for promotional embroidery bag and belt kit in Woman's Day magazine).

and adopted its publicly-stated objectives. See also PFF § I.A ¶ 29 (March 1964 press release announcing renaming of TIRC into CTR, announcing Liggett's joining CTR, touting TIRC's "steady expansion in our program of scientific research into tobacco use and health . . . .") Moreover, Liggett caused numerous public statements to be issued through the Tobacco Institute, which, like the Frank Statement years before, publicly promised to seek the true answers into the health effects of smoking. See, e.g., PFF § I ¶¶ 110, 135-138, 139 ("in the interest of absolute objectivity, the tobacco industry has supported totally independent research with completely non-restricted funding" and that "the findings were not secret"); ¶ 141 (1972 TI press release stating that "[t]he cigarette industry is as vitally concerned or more so than any other group in determining whether cigarette smoking causes human disease . . . and that despite this effort the answers to the critical questions about smoking and health are still unknown."); ¶142; ¶143 (1982 TI press release: "Since the first questions were raised about smoking as a possible health factor, the tobacco industry has believed that the American people deserve objective, scientific answers. The industry has committed itself to this task."); see also ¶¶ 144-45.

Liggett's repeated promises were false and misleading when made, and served to further the fraudulent goals of the Enterprise and the RICO conspiracy. As detailed above and in the United States' PFF, see PFF § I.B, C, F-H, J, and K, Defendants' participation in CTR and the other components of the Enterprise was not for the purpose of sponsoring disinterested, relevant research, but rather served the scheme to defraud. See also PFF § IV.F ¶ 2015 (Liggett General Counsel Frederick Haas memo regarding CTR); ¶ 2018 (letter agreement between CTR, American, B&W, Philip Morris, Reynolds, and Liggett regarding information storage and retrieval system for use by Defendants' attorneys); ¶ 2084 (Liggett internally admitting that CTR

projects “have only a peripheral connection to tobacco use.”).

In addition to what happened in word, it is also important to note what Liggett did in deed, especially in Liggett’s suppression of research and other material information that would, in fact, have revealed the connection between smoking and disease. As early as 1968, Liggett was concerned about, and acted to prevent, public statements about the effects of smoking on humans. In a 1968 draft statement from Liggett's Chairman to its shareholders, a proposed quote from Fortune magazine regarding smoking and health and relating to "irritant gases in cigarette smoke" was deleted by the editor of the statement. PFF § IV.F ¶ 2159. Similarly, Liggett suppressed information relating to its Project XA (see supra) and sequestered all such information under the auspices of its lawyers. PFF § IV.F ¶¶ 2160-2161.

During the 1990s, Liggett scientists were directed to label their work as privileged and confidential in order to prevent its discovery in civil litigation. PFF § IV.F ¶ 2125. Liability litigation concerns drove Liggett's research program throughout the 1990s and controlled the type of research that would be done and whether or not research would be done. Dennis Dietz, Liggett's Manager of Scientific Issues from 1991 to 1999, testified on July 1, 2002, that "instead of doing independent research into the question of smoking and health, the Company focused on insuring its products were no less harmful than those of its competitors." Dietz had regular product liability meetings with Liggett's outside counsel. When Dietz began working for Liggett he had an "orientation" meeting with outside counsel wherein they "open[ed] his eyes up to the fact that we were involved with research that wasn't just pure, really, academic,” but rather "health related issues . . . that potentially could – could impact on – on product litigation." PFF § IV.F ¶ 2190.

5. Liggett's Conduct Today

Liggett's unlawful and fraudulent activities continue to this day. For instance, despite knowing of smoker "compensation" and the fact that smoking "light" cigarettes are no less hazardous than regular cigarettes, Liggett still markets "low tar" brands with "light" descriptors. Similarly, Liggett continues to engage in marketing tactics that appeal to youths, such as couponing and "buy one get one free" offers for its cigarettes. PFF § IV.E ¶ 1848.

Moreover, as it had in the past, Liggett's improper concealment and suppression of material information continued well into the 1990s, see supra, pp.19-22; see also PFF § IV.F ¶¶ 2125, 2190, and there are still several documents, such as the Project XA files that belonged to Liggett in-house counsel Joseph Greer (who originally sequestered the XA documents in Liggett's Law Department), that have never been fully accounted for. PFF § IV.G ¶ 2405. In fact, in this very litigation, Liggett continues to attempt to conceal documents with misleading assertions of privilege and disregard of the orders of this Court, and to instruct its witnesses not to answer regarding various joint activities of the Defendants. See supra, p. 22.

6. Legal Conclusions Regarding Liggett's Participation in the RICO Conspiracy and Enterprise

The foregoing evidence conclusively establishes that Liggett knew the general nature of the conspiracy and that it extended beyond its individual role. Indeed, Liggett took substantial steps to facilitate the scheme to defraud that was the central purpose of the conspiracy, including committing numerous racketeering acts in furtherance of the Enterprise's affairs. Hence, Liggett entered into the requisite conspiratorial agreement. Accord Salinas, 522 U.S. at 66 ("even if Salinas did not accept or agree to accept two bribes, there was ample evidence that he conspired

to violate subsection (c). The evidence showed that [Salinas' conspirator] committed at least two acts of racketeering activity when he accepted numerous bribes and that Salinas knew about and agreed to facilitate the scheme. This is sufficient to support a conviction under § 1962(d)."); see also Aetna Cas. Surety Co. v. P & B Autobody, 43 F.3d 1546, 1562-63 (1st Cir. 1994)(§ 1962(d) RICO conspiracy relating to scheme to defraud insurance company by submitting false claims from defendant body shops through co-conspirator appraisers who "were at the hub of the overall RICO conspiracy"; "the jury reasonably could have found that, although each defendant may not have known the entire sweep of the conspiracy, each defendant knew that he or she was a part of a larger fraudulent scheme." "Through evidence of each individual Arsenal defendant's actions, the jury could infer that each defendant had the requisite state of mind for a RICO conspiracy violation--knowing participation." Despite the fact that the defendants disclaimed knowledge of the other body shop owners' fraudulent claims, the court noted that the defendants' racketeering activities were "unusually similar": "The body shops all defrauded Aetna, they reported nearly identical types of fraudulent claims, and they obtained appraisals from the same appraisers. Evidence of these similarities, considered along with other evidence, was sufficient to support a jury finding that the owners of the body shops conspired directly with one another."); Gagan v. American Cablevision, 77 F.3d 951, 962 (7th Cir. 1996) ("From the substantial direct and circumstantial evidence introduced at trial regarding the use of interstate mails and wires to contact the limited partners, inform them of the condition of their limited partnerships, deceive them, and acquire their interests, the jury could reasonably find that the defendants agreed to conduct or participate in the conduct of the affairs of South Hesperia with respect to the Falcon sale through a pattern of mail and wire fraud by employing those modalities in a scheme to

obtain money from the limited partners through false pretenses."); Atlas Pile Driving Co. v. DiCon Financial Co., 886 F.2d 986, 997 (8th Cir. 1989)(RICO conspiracy involving scheme to defraud housing subcontractors; where defendant (Conry) controlled entities involved in the sale and financing of the projects, and where defendant made misrepresentations in furtherance of fraudulent scheme, "it can be inferred that Conry was intimately involved in the scheme to defraud subcontractors of their labor and materials and that Conry agreed that the necessary predicate acts would be committed.").[23]

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[23] See also Hill v. Equitable Bank, 655 F. Supp. 631, 652-53 (D. Del. 1987), aff'd 851 F.2d 691 (3d Cir. 1988) (scheme to defraud investors in purchase of partnership interests: conspiracy conviction upheld where meetings between defendants "provide[d] sufficient evidence for a possible jury finding that an agreement existed."); United States v. Boylan, 898 F.2d 230, 242 (1st Cir. 1990) (RICO conspiracy conviction upheld where "the defendants and their activities were nothing short of striking: each defendant was a detective assigned to work nights in District 4 at some time during the indictment period; each received things of value, usually cash, from restaurant or nightclub owners in exchange for services not officially sanctioned; the targeted establishments were all in District 4 and all under the Board's aegis. The services themselves bore hallmarks of similarity. Moreover, there was a significant degree of interconnectedness. The defendants often cooperated with one another in collecting payments and in providing their specialized services. These common characteristics are precisely the kind of factors which can permissibly lead to the inference of a single conspiracy."); United States v. Ashman, 979 F.2d 469, 492 (7th Cir. 1992) (in investment scheme, evidence sufficient for RICO conspiracy where defendants served as "bag men" for each other, used similar procedures for covering losses, and "were well aware that they were part of an ongoing and flexible agreement to commit fraud as the need--or perhaps the opportunity--arose."); Church, 955 F.2d at 695 (defendant guilty of RICO conspiracy where government proved that he agreed personally to commit two predicate acts of selling cocaine, and defendant knew that a codefendant was a part of a group distributing cocaine, "thus proving agreement on an overall objective as well."); United States v. Hughes, 895 F.2d 1135, 1141-43 (6th Cir. 1990) (sufficient evidence for doctor's RICO conspiracy conviction in "blood-for-[illegal]-drugs" scheme where doctor's involvement with clinic, including assurances to pharmacists that prescriptions for controlled substances should be filled, "invites the inference drawn by the jury--he **agreed** to participate in the RICO enterprise"); United States v. Phillips, 874 F.2d 123, 128 (3d Cir. 1989) (evidence sufficient to support appellants' RICO conspiracy convictions where there was "not only knowledge but actual commission of four specific acts on the part of Phillips and two on the part of Brown"); Rastelli, 870 F.2d at 828-30 (RICO conspiracy convictions upheld where evidence demonstrated (continued...)

The foregoing evidence also establishes that Defendant Liggett participated in the operation or management of the Enterprise in full satisfaction of Reves.[24] Indeed, because Liggett is an "insider", i.e., a member of the Enterprise that had some part in directing significant aspects of the Enterprise's affairs, including the public dissemination of false, misleading or deceptive statements regarding the links between smoking cigarettes and adverse health consequences and addictiveness, this case does not even implicate the concerns of Reves. See, e.g., United States v. Owens, 167 F.3d 739, 754 (1st Cir. 1999)(holding that since Reves

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[23](...continued)
each defendant knew of general nature of the enterprise, involving a group of employers, union officials and organized crime figures, and knew that the enterprise extended beyond the individual role of each defendant, even if the defendant was not aware of each component of the enterprise).

Liggett's reliance (L. Br. at p. 19) upon Johnson Elec. N. Am. Inc. v. Mabuchi Motor Am. Corp., 98 F. Supp. 2d 480, 491-92 (S.D.N.Y. 2000) is misplaced. That decision held that because the alleged unlawful conduct did not constitute racketeering acts under RICO, the alleged agreement to commit that alleged unlawful conduct could not violate RICO.

[24] See, e.g., Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 269 (3d Cir. 1995)("[W]hen officers and/or employees operate and manage a legitimate corporation, and use it to conduct, through interstate commerce, a pattern of racketeering activity, those defendant persons are properly liable under § 1962(c)"); Davis v. Mutual Life Ins. Co. of New York, 6 F.3d 367, 371-72, 380 (6th Cir. 1993)(holding that a corporation (The Mutual Life Insurance Company of New York ("MONY") participated in the operation and management of an association-in-fact enterprise consisting of MONY, another insurance company (TWA), and an insurance agency (FIA) controlled by Donald Fletcher (an independent contractor who sold life insurance for MONY and later for TWA through fraud), because "the evidence revealed that, even after MONY had received numerous warnings concerning FIA's fraudulent sales tactics, MONY continued to allow, if not actively encourage, Fletcher and his associates to carry on with their [fraudulent] scheme"); Resolution Trust Corp. v. Stone, 998 F.2d 1534, 1540-42 (10th Cir. 1993)(holding that a corporation ("PIIGI") participated in the operation or management of an association-in-fact enterprise consisting of PIIGI and other corporations and some of their officers through PIIGI's control of one of the other corporate members of the enterprise and through PIIGI's deceptive and fraudulent conduct in coordination with other members of the enterprise to further the principal goal of the enterprise to sell automobile loan paper known as "enhanced automobile receivables" through fraud). See also cases cited supra, pp. 7-11 & n.9.

involved the liability of an "outsider" to an enterprise, "Reves' analysis does not apply where a party is determined to be **inside** a RICO enterprise."). Accord Houlihan, 92 F.3d at 1298-99; United States v. Gabriele, 63 F.3d 61, 68 (1st Cir. 1995). Cf. Parise, 159 F.3d at 797.

Assuming **arguendo** that the evidence is insufficient to establish Liggett's participation in the operation or management of the Enterprise, Liggett is, nonetheless, liable for the RICO conspiracy because Reves' "operation or management" test does not apply to a RICO conspiracy offense. See PCL § I.C, pp. 78-82.

II

LIGGETT ENGAGED IN A PATTERN OF RACKETEERING ACTIVITY

The United States set forth extensive evidence and legal analysis establishing that all the Defendants, including Liggett, engaged in a pattern of racketeering activity. See PCL § I. F and G; PFF §§ IV, V and VI; and supra § I. B. In particular, the evidence established that Liggett committed 16 of the specifically alleged Racketeering Acts in furtherance of the scheme to defraud and the RICO offenses for the reasons set forth in PFF § V.B.[25] Liggett provides neither evidence nor legal analysis that undermines the United States' demonstration in that respect. Rather, Liggett baldly asserts that it "has not committed any predicate acts in furtherance of an alleged RICO" offense. L. Br. at p. 22. Plainly, Liggett's bare, self-serving denial is not sufficient to overcome the evidence established by the United States.

Moreover, Liggett improperly argues (L. Br. at pp. 22-23) that racketeering acts committed by co-defendants and co-conspirators may not be considered in determining whether

[25] See PFF § V.B, ¶¶ 13, 17, 22, 28, 31, 38, 44, 66, 67, 70, 73, 77, 88, 112, 118 and 126. These paragraph numbers correspond to the numbered Racketeering Acts Liggett committed. See also PFF § V.A and PCL §I.F.

the requisite "pattern" of racketeering activity has been established. Although to prove a substantive RICO violation, the United States must prove that each defendant itself committed or aided and abetted at least two racketeering acts,[26] it is well established that racketeering acts committed by co-defendants and co-conspirators, including uncharged racketeering acts, may be considered to determine the "continuity" component of the requisite "pattern" of racketeering activity.[27] Therefore, the racketeering acts committed by Liggett's co-defendants may be

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[26] However, to prove the RICO conspiracy charge against Liggett, it is not necessary to prove that any co-defendant or co-conspirator committed any racketeering act. See, e.g., Salinas, 522 U.S. at 63-65; United States v. Zauber, 857 F.2d 137, 148 (3d Cir. 1988); United States v. Caporale, 806 F.2d 1487, 1515 (11th Cir. 1986); United States v. Teitler, 802 F.2d 606, 612-13 (2d Cir. 1986)(collecting cases); United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986); United States v. Adams, 759 F.2d 1099, 1116 (3d Cir. 1985); United States v. Brooklier, 685 F.2d 1208, 1222-23 (9th Cir. 1982); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981). See also cases cited supra n.6.

[27] For example, in H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 242-43 (1989), the Supreme Court noted that a relatively few predicate acts over a short time span may nevertheless satisfy the threat of continuity where the racketeering acts were committed in association with other individuals or businesses that likewise committed or posed a threat of commission of other unlawful activities. Similarly, in United States v. Richardson, 167 F.3d 621, 625-26 (D.C. Cir. 1999), the District of Columbia Circuit explained that in light of the totality of all the co-defendants' serious unlawful conduct, their "'past conduct...by its nature project[ed] into the future with a threat of repetition,' thus satisfying RICO's pattern requirement." Id. at 626 (quoting H.J. Inc., 492 U.S. at 241).

See also Tabas v. Tabas, 47 F.3d 1280, 1294-95 (3d Cir. 1995) (en banc) (continuity in RICO case based on mail fraud predicates may be established by the overall nature of the underlying fraudulent scheme in addition to the alleged predicate acts); United States v. Busacca, 936 F.2d 232, 238 (6th Cir. 1991) (The defendant, a union president and trustee of a benefit fund, embezzled $258,435 from the fund by issuing six checks to himself over a 2 ½ month period. The court said that "the threat of continuity need not be established solely by reference to the predicate acts alone; facts external to the predicate acts may, and indeed should, be considered." The court found the requisite threat of continuity from the defendant's control of the union and the fund, the acts of concealment and disregard for proper procedures, and that there was nothing to stop the defendant's unlawful conduct until he was found liable); United States v. Alkins, 925 F.2d 541, 551-53 (2d Cir. 1991) (The requisite continuity may be established against a defendant (continued...)

considered in determining the requisite continuity, especially the racketeering acts committed by TI since Liggett was a member of TI from its inception in January 1958 until June 1993, and again from September 1994 to 1996.

Even assuming **arguendo** that the determination of the requisite "pattern" is limited to the racketeering acts committed by Liggett, the evidence establishes the requisite pattern. For example, Liggett's racketeering acts were committed from January 12, 1967 (Racketeering Act 13) to April 14, 1994 (Racketeering Act 112). See supra n.25. Therefore, Liggett's racketeering

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[27](...continued)
by evidence of crimes by other members of the enterprise not charged in the indictment); United States v. Coiro, 922 F.2d 1008, 1017 (2d Cir. 1991) (continuity established where a corrupt attorney's bribery of public officials and money laundering spanning approximately four months was part of a long term drug enterprise that engaged in other unlawful activities that was likely to continue "absent outside intervention"); United States v. Gonzalez, 921 F.2d 1530, 1544-45 & n.23 (11th Cir. 1991) (evidence of continuity was not limited to the defendant's single short lived episode of interstate travel to possess or import drugs and the act of importation and possession of the drugs on the same day, but rather was adequately established by evidence of ongoing drug trafficking by other members of the enterprise); United States v. Link, 921 F.2d 1523, 1527 (11th Cir. 1991) (evidence of continuity was not limited to the defendant's two acts of possession of drugs with intent to distribute, but rather was adequately established by evidence of other unlawful drug trafficking by other members of the enterprise); United States v. Hobson, 893 F.2d 1267 (11th Cir. 1990) (continuity established where the defendant's two racketeering acts for importation of a load of marijuana and possession of the **same** load of marijuana where they were committed pursuant to an enterprise's ongoing drug trafficking); United States v. Kaplan, 886 F.2d 536, 543 (2d Cir. 1989) (continuity may be established by "external facts" in addition to the defendant's racketeering acts and the nature of the enterprise); United States v. Indelicato, 865 F.2d 1370, 1383-84 (2d Cir. 1989) (continuity established where the defendant's simultaneous murder of three persons was done in furtherance of an organized crime group that was an ongoing enterprise).

Lippe v. Bairnco Corp., 225 B.R. 846, 860-61 (S.D.N.Y. 1998), rearg. granted in part, 229 B.R. 598 (S.D.N.Y. 1999), upon which Liggett mistakenly relies (L. Br. at p. 22), is not to the contrary. That court noted that to prove a substantive RICO violation, "the purported acts of every defendant can [not] be imputed to every other defendant" absent proof "that these separate corporate entities acted together or are responsible for transactions other than the ones in which they were directly involved." 225 B.R. at 860-61. Lippe did not address, much less turn on, whether the racketeering acts of co-conspirators in furtherance of RICO substantive and conspiracy offenses may be considered to determine the requisite "continuity".

acts spanned "a substantial period of time" (27 years), and hence "closed-ended" continuity has been established. See PCL, pp. 66-68 and cases cited in n. 61. In addition, Liggett's racketeering acts "are a regular way of conducting defendant's ongoing legitimate business" (H.J. Inc., 492 U.S. at 243), and since Liggett continues to be in a position to continue its fraudulent activity and is in fact continuing it (see supra § I.B), "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future." 492 U.S. at 242. Therefore, the evidence establishes "open-ended" continuity. See PCL, pp. 64-68 and cases cited n. 61.

Moreover, Liggett's racketeering acts possess the requisite relationship under all of the permissible alternatives. All of Liggett's racketeering acts have the same or similar purposes and methods of commission - i.e., the acts involve mailings or wire transmissions by Liggett and its agents to carry out shared purposes of the charged scheme to defraud consumers and potential consumers of cigarettes. Furthermore, Liggett's racketeering acts furthered the goals of the Enterprise and benefitted the Enterprise in that they were in furtherance of the overarching scheme to defraud the public as well as the Enterprise's goal to suppress, conceal and destroy documents and other information that might be discoverable in smoking and health related liability cases. Additionally, Liggett's control of, or participation with others in, the Enterprise facilitated its commission of the racketeering acts. See PCL, pp. 62-65 and cases cited in notes 56-58 and 61.

III

THERE IS A REASONABLE LIKELIHOOD THAT LIGGETT WILL VIOLATE THE LAW IN THE FUTURE

Citing United States v. Carson, 52 F.3d 1173 (2d Cir. 1995) and United States v. Local 30, United Slate Tile, 871 F.2d 401 (3d Cir. 1989), Liggett argues (L. Br. at p. 24) that "unless the alleged RICO enterprise and the attendant RICO violations are shown to be continuing into the future, Section 1964(a) does not authorize the government to seek, or for the Court to grant, any relief at all." However, Carson and Local 30 said no such thing.

Rather, Carson and Local 30 followed the general principle of law that "[w]hether [equitable] relief is appropriate under § 1964(a) depends on whether there exists a likelihood that wrongful acts will be committed in the future." Local 30, 871 F.2d at 408-09. However, the "likelihood" that a defendant will commit wrongful acts in the future is simply not the same as requiring proof that the RICO offense at issue in fact is "continuing into the future", as Liggett mistakenly asserts. Indeed, immediately following the above-quoted statement in Local 30 that Liggett cites, the Third Circuit stated:

> The likelihood of future wrongful acts is frequently established by inferences drawn from past conduct.

Local 30, 871 F.2d at 409. Under well-established authority, including Local 30, the United States established that there is a reasonable likelihood of future unlawful conduct by all the Defendants, based upon the Defendants', including Liggett's, extensive pattern of past, deliberate unlawful conduct standing alone, and that consequently the United States is entitled to equitable

relief. See PCL, pp. 82-86 and cases cited n. 74.[28] Nor is the United States' showing in that respect vitiated by Liggett's alleged abandoment of the RICO conspiracy, as Liggett mistakenly argues, "since it is well established that mere "cessation of violations . . . is no bar to the issuance of an injunction" because past violations are "highly suggestive of the likelihood of future violations.[29]

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[28] Liggett compounds its misinterpretation of Carson and Local 30 by stating that "unless the government can demonstrate a continuing RICO here - an open-ended pattern of racketeering activity into the future - it cannot meet its burden or prove its case". L. Br. at p. 24. Liggett mistakenly conflates and misinterprets two distinct issues: (1) the requisite "continuity" to prove a pattern of racketeering activity to establish RICO liability and (2) whether there is a reasonable likelihood of future wrongful conduct to obtain injunctive relief.

Contrary to Liggett's argument, the requisite "continuity" to establish a "pattern" may be established by several alternative methods of proof, including "closed-ended" continuity based upon past racketeering acts that spanned a substantial period regardless of any threat of future unlawful conduct, as well as by "open-ended" continuity. See supra, pp. 42-44 and n.27 and PCL § I.G, pp. 64-68. "Open-ended" continuity may also be established without showing that the RICO violation is continuing into the future. For example, in Indelicato, 865 F.2d at 1383-84, the Second Circuit held that the requisite continuity was established by the defendant's simultaneous murder of three persons that took literally only a few moments because the murders were committed in furtherance of a Mafia organized crime group that posed a potential threat of future unlawful activity. Therefore, the nature of the RICO enterprise and its activities may demonstrate a threat of future unlawful activity without having to prove that the RICO offense is actually continuing into the future. See also cases cited supra n.27.

The "reasonable likelihood of future wrongful conduct" may be proven by inferences from past unlawful conduct, and/or other evidence showing a reasonable likelihood that a defendant might engage in unlawful conduct in the future, without having to prove that the RICO offense is in fact continuing into the future. See PCL § III.A, pp. 82-86.

[29] Hecht Co. v. Bowles, 321 U.S. 321, 327 (1944); SEC v. Management Dynamics, Inc., 515 F.2d 801, 807-08 (2d Cir. 1975). Accord City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 and n. 10 (1982); United States v. Parke, Davis & Co., 362 U.S. 29, 47-49 (1960); United States v. Odessa Union Warehouse Co-Op., 833 F.2d 172, 176 (9th Cir. 1987); Campbell v. McGruder, 580 F.2d 521, 540 (D.C. Cir. 1978); SEC v. Commonwealth Chemical Securities, Inc., 574 F. 2d 90, 98-99 (2d Cir. 1978); Pullman v. Greene, 396 F.2d 251, 256-57 (5th Cir. 1968).

Moreover, contrary to Liggett's argument, Carson did not impose limitations on all equitable relief under RICO. Rather, Carson affirmed the injunction against the defendant, see Carson, 52 F.3d at 1179, 1190, and **only** imposed a limitation on the scope of disgorgement, stating that "[o]rdinarily, the disgorgement of gains ill-gotten long in the past. . . [requires] a finding that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." Id. at 1182. In any event, the United States established that Carson was wrongly decided, is distinguishable from this case, and does not bind this Court. See PCL, pp. 134-144.

Furthermore, because Liggett is not entitled to retain its unlawfully-obtained proceeds even if it has recently reformed, the United States is still entitled to disgorgement of Liggett's unlawful proceeds independent of its entitlement to an injunction. See PCL, pp. 92-94 and pp. 143-44 & n. 111.

In sum, Liggett has not established any authority either supporting its position that equitable relief under RICO is unavailable absent a showing that the RICO offense is "continuing in the future," or refuting the United States' demonstration of its entitlement to equitable relief. Moreover, Liggett has not said anything that undermines the substantial evidence that the Defendants, including Liggett, have continued to engage in unlawful, fraudulent and deceptive conduct from 1995 to the present. See PFF § VIII; PCL § III. B, pp. 86-93; and supra § I. B.[30]

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[30] It bears repeating that Liggett's liability may be based upon its co-conspirators' conduct undertaken in furtherance of a conspiracy and a scheme to defraud in addition to Liggett's own misconduct. See supra p. 3; PCL, pp. 48-62, 69-70. Moreover, Liggett is jointly and severally liable for the total amount of unlawful proceeds obtained by all the Defendants through their joint scheme to defraud and RICO violations. See PCL, p. 104 and n. 86, and the United States' Reply to Joint Defendants' Preliminary Proposed Conclusions of Law Regarding (continued...)

IV

LIGGETT'S CIVIL LIABILITY IS NOT PRECLUDED BY ITS ALLEGED WITHDRAWAL FROM THE RICO CONSPIRACY AND IN ANY EVENT LIGGET HAS NOT DEMONSTRATED ITS WITHDRAWAL

Liggett also argues that it is not liable for the RICO conspiracy charge because it withdrew from the RICO conspiracy in about 1996 to 1997. L. Br. at pp. 3, 18, 23-24. Liggett mistakenly relies on the defense of withdrawal that typically applies in criminal conspiracy prosecutions where a defendant claims his prosecution is time barred because he withdrew from the charged conspiracy before the commencement of the applicable statute of limitations period. However, that rationale has no application here for two principal reasons. First, this case involves a civil suit brought by the United States to obtain equitable relief to which a statute of limitations does not apply. See U.S. Rep. to JD. PPCL § X. C. Liggett cannot escape liability for equitable relief, especially disgorgement of ill-gotten proceeds, even if it withdrew from the RICO conspiracy. Second, the charges here include substantive mail and wire fraud offenses. Even in criminal prosecutions involving such offenses, the defense of withdrawal does not preclude liability.

Even assuming **arguendo** that the defense of withdrawal applies here, Liggett has not carried his burden of establishing its withdrawal. On the contrary, the evidence conclusively establishes that Liggett continues to derive profits from the fruits of its RICO offenses and scheme to defraud and engage in other conduct in furtherance of the RICO offenses and scheme to defraud. See supra § I. B, pp. 20-22, 33-34, 36-37.

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[30](...continued)
Affirmative Defenses, (hereinafter "U.S. Rep. to JD. PPCL"), § IV.

A. The Defense of Withdrawal Does Not Preclude Liggett's Civil Liability

1. In criminal RICO prosecutions, a defendant may avoid liability for a RICO offense if he demonstrates that he withdrew from the RICO offense prior to the commencement of the applicable statute of limitations, and therefore the prosecution is time barred.[31]

However, in asserting sovereign governmental rights, it is well established that the United States is not bound by statutes of limitations unless Congress has clearly and unequivocally manifested such intention, see, e.g., Illinois Central R.R. Co. v. Rogers, 253 F.2d 349, 352 (D.C. Cir. 1958), and that unless Congress expressly provides, actions by the United States for equitable relief are not subject to statutes of limitations. See, e.g., Holmberg v. Albrecht, 327 U.S. 392, 396 (1946); United States v. Summerlin, 310 U.S. 414, 416 (1940); Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938). See also SEC v. Rind, 991 F.2d 1486, 1490 (9th Cir. 1993)(enforcement action for disgorgement of profits); see also U.S. Rep. to JD. PPCL § X. C. Consistent with this well-established principle, RICO actions for equitable relief brought by the United States, as involved here, are not subject to statutes of limitations. See, e.g., United States v. Private Sanitation Ass'n of Nassau/Suffolk, Inc., 793 F. Supp. 1114, 1152 (E.D.N.Y. 1992); United States v. International Bhd. of Teamsters, 708 F. Supp. 1388, 1402 (S.D.N.Y. 1989); United States v. Bonnano Organized Crime Family, 695 F. Supp. 1426, 1430-31 (E.D.N.Y. 1988).

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[31] See, e.g., United States v. Zizzo, 120 F.3d 1338, 1357-58 (7th Cir. 1997); United States v. Starrett, 55 F.3d 1525, 1550 (11th Cir. 1995); United States v. Antar, 53 F.3d 568, 579-80 (3d Cir. 1995); United States v. Nava-Salazar, 30 F.3d 788, 799 (7th Cir. 1994); United States v. Minicone, 960 F.2d 1099, 1108 (2d Cir. 1992).

Therefore, the rationale underlying the withdrawal defense in criminal prosecutions does not apply here since no statute of limitations applies. As the District of Columbia Circuit stated, "[b]efore the statute [of limitations] runs out the individual remains liable for his own criminal acts, and also for the acts of his co-conspirators, including those acts occurring after the individual's own last overt act in furtherance of the conspiracy." In re Corrugated Container Antitrust Litigation, 662 F.2d 875, 886 (D.C. Cir. 1981). See also United States v. Nava-Salazar, 30 F.3d 788, 799 (7th Cir. 1994)("A withdrawal defense to a conspiracy charge is relevant only when 'coupled with the defense of a statute of limitations'. . . . withdrawal does not absolve a defendant from his membership in a conspiracy")(citation omitted); United States v. Loya, 807 F.2d 1483, 1493 (9th Cir. 1987)("To avoid complicity in a conspiracy, one must withdraw before any overt act is taken in furtherance of the agreement")(internal quotations and citations omitted); United States v. Read, 658 F.2d 1225, 1232 & 1233 n. 4 (7th Cir. 1981)("[A]fter a defendant withdraws, he is no longer a member of the conspiracy and the later acts of the conspirators do not bind him. The defendant is still liable, however, for his previous agreement and for the previous acts of his co-conspirators in pursuit of the conspiracy . . . Dropping out during the limitations period does not absolve a defendant"). Accordingly, even assuming **arguendo** that Liggett withdrew from the RICO conspiracy in about 1996 to 1997 as it alleges (L. Br. 3, 18, 23-24), Liggett remains civilly liable for its unlawful conduct and the conduct of its co-conspirators that was in furtherance of the RICO conspiracy while Liggett was a member of the RICO conspiracy during the period before 1997.[32]

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[32] At most, Liggett conceivably could argue that evidence of its co-conspirators' acts and declarations undertaken in furtherance of the RICO conspiracy after Liggett withdrew from the (continued...)

Paramount equity considerations further support the conclusion that Liggett's alleged withdrawal does not preclude Liggett's liability for the sought relief. The District of Columbia Circuit and other federal courts of appeals have repeatedly ruled that "[d]isgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the . . . laws." SEC v. First City Financial Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989). Accord cases cited PCL, p. 94 n. 76. Therefore, Liggett is not entitled to keep its unlawful proceeds obtained from its RICO violations even if in about 1996 to 1997 it did cease its participation in the RICO conspiracy and Enterprise. To rule otherwise would eviscerate the deterrent effect of disgorgement and would permit unjust enrichment, and hence would vitiate the primary purposes of disgorgement. See United States v. Odom, 252 F.3d 1289, 1299 (11th Cir. 2001) (upholding joint and several restitution order for co-conspirator in church-burning case, despite claim that she withdrew from the conspiracy: "A restitution order may order payment of losses consistent with the common law of conspiracy. Namely, a defendant convicted of participation in a conspiracy is liable not only for her own acts, but also those reasonably foreseeable acts of others committed in furtherance of the conspiracy."); see also discussion at PCL, pp. 136-38, and U.S. Rep. to JD. PPCL § IV.

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[32](...continued)
RICO conspiracy in about 1996 to 1997 is not admissible against Liggett as co-conspirator statements and acts in furtherance of the RICO conspiracy. See, e.g., Hyde v. United States, 225 U.S. 347, 367-71 (1912); United States v. Diaz, 176 F.3d 52, 99 (2d Cir. 1999)(ruling that when a defendant participates in a conspiracy which is not time-barred, "the significance of his withdrawal relates only to the improper use against him of subsequent acts and declarations of co-conspirators")(citation omitted); Read, 658 F.2d at 1232 & 1233 n. 4 (7th Cir. 1981)("[A]fter a defendant withdraws, he is no longer a member of the conspiracy and the later acts of the conspirators do not bind him"). But, the argument that the acts of Liggett's co-conspirators after 1997 are not admissible against Liggett is unavailable for the reasons stated infra.

At bottom, since the civil RICO charges at issue here are not time-barred, Liggett's alleged withdrawal from the RICO conspiracy and Enterprise does not preclude Liggett's liability for its unlawful conduct and its co-conspirators' conduct in furtherance of the conspiracy committed before Liggett allegedly withdrew in 1996 to 1997. Liggett has no right to keep its unlawfully obtained proceeds to which it had no cognizable right to in the first place. See PCL, pp. 94-102.

Finally, it is particularly significant that Liggett does not cite a single decision, and the United States is not aware of any, holding that a participant in a conspiracy, or scheme to defraud, may escape civil liability entirely for equitable relief in a suit brought by the United States simply because at some point after committing substantial unlawful conduct the wrongdoer abandoned or withdrew from the unlawful venture.

2. Moveover, even in criminal prosecutions involving substantive mail and wire fraud offenses, as involved here, withdrawal does not preclude liability. For example, in United States v. Read, 658 F.2d 1225, 1239-40 (7th Cir. 1981), the court held that withdrawal was not a defense to substantive mail and securities fraud offenses. The court explained the differences between application of the withdrawal defense to conspiracy and substantive offenses:

> The predicate for liability for conspiracy is an agreement, and a defendant is punished for his membership in that agreement. Mail and securities fraud, on the other hand, punish the act of using the mails or the securities exchanges to further a scheme to defraud. No agreement is necessary. A party's "withdrawal" from a scheme is therefore no defense to the crime because membership in the scheme is not an element of the offense. Speigel is liable for mail fraud as a principal or as an aider and abettor, not a conspirator. As an aider and abettor, Spiegel need not agree to the scheme. He need only associate himself with the criminal venture and participate in it.

Id. at 1240. Accord United States v. Waldrop, 786 F. Supp. 1194, 1201 (E.D. Pa. 1991) ("withdrawal is no defense to mail fraud"), aff'd, 983 F.2d 1054 (3d Cir. 1992) (Table).

For the foregoing reasons, Liggett's alleged withdrawal from the RICO conspiracy does not preclude its liability for substantive mail and wire fraud offenses that underly a civil RICO lawsuit for equitable relief brought by the United States. In any event, Liggett has not established its withdrawal from the RICO conspiracy and Enterprise.

B. Liggett Has Not Carried Its Burden of Establishing Withdrawal

1. "To establish withdrawal, a co-conspirator has the burden of proving more than mere cessation of his unlawful activities. Rather, a co-conspirator must also prove either that: (1) he took "affirmative action . . . to disavow or defeat the purpose" of the conspiracy which is communicated in a manner reasonably calculated to reach co-conspirators, or (2) he disclosed the unlawful scheme to the authorities.[33]

Liggett claims that the following purported "facts" establish that in about 1996 to 1997, it abandoned or withdrew from the RICO conspiracy and Enterprise: (1) Liggett admitted that smoking cigarettes causes cancer and is addictive (L. Br. at pp. 2, 7, 9); (2) Liggett agreed to FDA jurisdiction and has allegedly cooperated with the scientific community and state attorneys general concerning smoking related issues (id., pp. 2-3, 7-10, 12-13); (3) government officials and others have complimented Liggett for its "contributions to the public health community" (id., pp. 3, 7-9, 12-15, 17-18); (4) Liggett instructed its marketing and advertising personnel to avoid

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[33] Hyde, 225 U.S. at 369. Accord United States v. United States Gypsum Co., 438 U.S. 422, 463-64 (1978); In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599, 616 (7th Cir. 1997); United States v. Thomas, 114 F.3d 228, 267-68 (D.C. Cir. 1997)(collecting cases); In Re Corrugated Container Antitrust Litigation, 662 F.2d 875, 886 (D.C. Cir. 1981).

targeting the youth market (id., p. 10); (5) Liggett "became the first domestic cigarette manufacture[r] to begin to disclose the ingredients of its brands" (id., p. 10); (6) Liggett released "certain" internal documents relevant to smoking and health issues (id., p. 10-11); (7) Liggett's CEO testified at various proceedings in a manner inconsistent with the objectives of the conspiracy (id., pp. 11-12); and (8) Liggett is acting independently from the other tobacco company Defendants and has been "ostracized" from them. (Id., pp. 15, 18).

2. The United States acknowledges that Liggett has taken a few steps that, viewed in isolation, are arguably inconsistent with the objectives of the RICO conspiracy. However, such steps fall short of disclosing the conspirators' unlawful scheme to the authorities or taking decisive action "to disavow or defeat" the conspiracy, as is required to establish withdrawal. See cases cited supra n. 33 and infra notes 34-35 and 39-41. Moreover, such steps properly viewed in the totality of Liggett's conduct do not refute that Liggett continues to be a member of the RICO conspiracy and Enterprise.

For example, to this day, Liggett continues to claim that there never was a RICO conspiracy and Enterprise as alleged and proven by the United States, and that it never participated in them. L. Br. at p. 2 n. 1, pp. 3, 19. Liggett's position in that regard hardly constitutes **a full disclosure of the unlawful scheme to the authorities** or action to defeat the conspiracy, as is required to establish withdrawal.[34] Furthermore, Liggett's actions indicate self-

[34] See, e.g., United States v. Chambers, 944 F.2d 1253, 1265 (6th Cir. 1991)(defendant's cessation of activities in furtherance of a drug trafficking conspiracy and her admission to the authorities that she sold $100 worth of cocaine, "but otherwise provided little information" did not establish withdrawal. The defendant's "statement is not **a full confession** and, in fact, evidence a lack of cooperation with authorities.")(emphasis added); United States v. Piper, 298 F.3d 47, 53 (1st Cir. 2002)("Typically [withdrawal] requires 'either. . . **a full confession to**

(continued...)

serving efforts to minimize its liability in the face of numerous lawsuits, rather than efforts to defeat the conspiracy.[35]

Moreover, Liggett touts its recent conduct during the state attorneys general litigation, in which it provided assistance and "**certain** of its internally held documents relevant to smoking and health issues" (L. Br. at 10; emphasis added) to some of the state attorneys general which assisted in their prosecution of those litigations. However, Liggett fails to mention that many of these documents had already been released well before Liggett ever chose to settle; see, e.g., American Tobacco Co. v. State of Florida, 697 So.2d 1249, 1252 (Fla. Dist. Ct. App. 1997) (noting that "[m]any of these documents have already been publicly disclosed as a result of litigation in the Haines case," a privilege finding **over** Liggett's objection and **against** Liggett–see PFF § I ¶ 500), and many of the documents were never privileged in the first instance. For example, Liggett (and certain other Defendants) "undertook to misuse the attorney/client relationship to keep secret research and other activities related to the true health dangers of smoking", see PFF § I, ¶ 494 (State of Florida v. American Tobacco Co., Civ. Action No. CL 95-1466 AH (Palm Beach Cty., Fla., filed Feb. 21, 1995), and that Defendants (including

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[34](...continued)
authorities or a communication by the accused to his co-conspirators that he has abandoned the enterprise and its goals")(citation omitted; emphasis added); United States v. Wilson, 134 F.3d 855, 863 (7th Cir. 1998)(defendant's limited confession to the authorities and subsequent denials of culpability did not establish "a **full** confession to the authorities" as required to establish withdrawal).

[35] See, e.g., United States v. Maloney, 71 F.3d 645, 655 (7th Cir. 1995)(evidence that the defendant took actions that "did not comport with the conspiracy's objectives" after learning of the authorities' investigation of the defendant's conduct did not establish withdrawal); United States v. Pofahl, 990 F.2d 1456, 1484 (5th Cir. 1993)(defendant's canceling of a trip to arrange a drug shipment "in the face of possible arrest is hardly an affirmative action to defeat the conspiracy").

Liggett) "attempted to misuse legal privileges to hide research documents" and "that the industry, contrary to its public statements, was suppressing information about smoking and health." See PFF § I, ¶ 496 (State of Washington v. American Tobacco Co., Inc., et al., No. 96-2-15056-8 SEA (King Cty. Sup. Ct. 1998). Moreover, contemporaneous with Liggett's cooperation and disclosures on some fronts, other courts have found Liggett's discovery conduct, including its claims of privilege, inappropriate. See PFF § I ¶ 497 (Sackman v. Liggett litigation; Liggett's attempt to withhold Special Projects documents was inappropriate).

Liggett also asserts that it has "instructed its marketing and advertising personnel scrupulously to avoid any and all marketing that could appeal to children or adolescents." L. Br. at 10. However, Liggett does nothing to determine whether its current marketing practices attract youths. See, e.g., PFF § IV.E ¶ 1510. Moreover, Liggett's current designee on MSA youth smoking issues, Mr. John Long, could not say whether Liggett has done anything to change its marketing practices in light of the MSA restrictions. PFF § IV.E, ¶ 1896. Liggett continues to engage in marketing tactics that appeal to youths, such as couponing, sampling, and "buy one get one free" offers for its cigarettes. PFF § IV.E ¶ 1848.

Liggett also states (L. Br. p. 5-6) that it "compiled a nine-volume study summarizing its research in the area of smoking and health" and provided that compilation to the Surgeon General in 1963. See also L. Br. at 2 (Liggett shared "much of [its biological] research with the government"). However, Liggett fails to mention that its report did not disclose all of Liggett's internal knowledge and research relating to smoking and health, including the 1961 report from Liggett's research firm, Arthur D. Little, that concluded that cigarette tobacco was "cancer causing," "cancer promoting," and "poisonous." See PFF § IV.A ¶¶ 111-112. Indeed, Liggett's

1963 submission to the Surgeon General focused on alternative causes of disease (such as air pollution and coffee); criticized the alleged statistical association between smoking and diseases as "unreliably conducted" and "inadequately analyzed," despite the fact that Liggett internally acknowledged this causal relationship; and concluded that the association between smoking and disease was inconclusive and was in fact due to other factors, despite the fact that Liggett knew otherwise.[36]

Liggett further states that it "became the first domestic cigarette manufacture [sic] to begin to disclose the ingredients of its brands." L. Br. at 10. This statement is misleading at best. Although Liggett has, in fact, disclosed certain ingredients, according to Dr. Dennis Deitz, Liggett's Manager of Scientific Issues for nine years, Liggett does not now, nor has it ever, disclosed all of the ingredients in its cigarettes to the public or to public health authorities. Included in the list known to Liggett that are not disclosed are ingredients in the paper, filters, base ingredients of various additives, and indirect ingredients (also known as flavor packages and those ingredients that result as the cigarette is smoked), including perazines, heterocyclic compounds, and potential mutagens. Furthermore, certain of the non-disclosed ingredients, especially those in the filter, paper, and additives, can affect nicotine delivery.[37]

Moreover, despite admitting in the mid-1990s that cigarettes cause lung cancer, and that nicotine is addictive, as of 2000, Liggett had not made any product design changes on any of its

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[36] LWDOJ 9504565-7553, at pp. 9504569, 9504570, 9504573, 9504578.

[37] Deposition of Dr. Dennis Dietz, July 1, 2002, pp. 96-117.

products that could potentially make them less hazardous or less addictive.[38] Moreover, since the filing of the United States' Complaint, Vector Group has created several Liggett affiliates, which perform various functions originally performed by Liggett. For instance, Liggett Vector Brands conducts advertising and marketing for the group, and Epic Holdings holds the promissory note for several hundred million dollars for the sale of various Liggett brands that were sold to Philip Morris in 1999; Vector Research conducts tobacco-related research, including research related to smoking and health. The company has spun off its "safer cigarette" research staff, products and research to what is now Vector Tobacco. Bennett LeBow, controlling shareholder and CEO of Liggett's parent company, Vector Group, testified in 2002 that this spin-off was due in part to litigation concerns. PFF § VIII ¶ 166.

Moreover, several Liggett and Vector Tobacco (Liggett's corporate affiliate) scientists and executives admitted in sworn testimony in 2002 that they were aware of compensation and the flaws in the FTC method for measuring nicotine levels in cigarettes. Notwithstanding this knowledge, the company still uses product design methods which result in nicotine amounts greater than those indicated in its FTC disclosures. This continued use of features that induce misleading FTC yields comes despite Vector's stated ability to produce cigarettes whose true yields are substantially closer to those measured by the FTC and other smoking machine tests. PFF § IV.C ¶ 742; see also PFF § IV.D ¶¶ 951, 953, 1000.

[38] Furthermore, Liggett's actions–changing its positions on causation and addiction in litigation, placement of an additional warning on cigarette packaging, and issuing a single press release–while perhaps the first step, can hardly be said to have remedied Liggett's years of participation in an extensive scheme to defraud, and in the RICO Enterprise and conspiracy.

In sum, even though several of Liggett's self-aggrandizing statements contain some truth and may be commendable, Liggett is not entitled to escape liability for its extensive pattern of unlawful conduct. Liggett has not disclosed the unlawful conspiracy and scheme to defraud to the authorities. Quite the contrary, Liggett persists in its unfounded claim that the alleged RICO Enterprise and conspiracy never existed. Nor has Liggett taken sufficient steps to disavow or defeat the RICO conspiracy and scheme to defraud. In these circumstances, Liggett has not carried its burden of establishing withdrawal.[39]

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[39] See, e.g., United States v. Zimmer, 299 F.3d 710, 718 (8th Cir. 2002) ("'[I]t is not easy to withdraw from a criminal conspiracy.' . . . . Zimmer must do more than demonstrate that he undertook no conspiratorial activity after the cut-off date; he must demonstrate that he took affirmative action to withdraw from the conspiracy either by making a clean breast to the authorities or by communicating his withdrawal in a manner reasonably calculated to reach his coconspirators. . .To make a clean breast of a conspiracy, the conspirator must 'sever all ties to the conspiracy and its fruits, **and** act affirmatively to defeat the conspiracy by confessing to and cooperating with the authorities")(citations omitted); United States v. True, 250 F.3d 410, 425 (6th Cir. 2001) (in price-fixing conspiracy, "even if the conspirators at some point in 1992 agreed to no longer **discuss** pricing and bidding, there was no effective withdrawal by any co-conspirator because they continued to **act** based on their prior discussions . . . ." (emphasis in original)); United States v. Odom, 252 F.3d 1289, 1299 (11th Cir. 2001) ("Merely leaving the church grounds did not necessarily end the conspiracy, nor her participation in the conspiracy. Boone took no affirmative acts inconsistent with the conspiracy: she did not put the original fire out; she did not convince the others to leave; and she did not announce to the others that she had changed her mind about the original plan to 'burn the nigger church.' She is, therefore, appropriately liable for the acts of the other members of the conspiracy."); United States v. Alred, 144 F.3d 1405, 1415 (11th Cir. 1998) ("the government presented evidence that, while the divorce of Irma and Charlie Alred resulted in competition among some of the coconspirators during the later stages of the conspiracy, the goal of obtaining and distributing marijuana through known sources remained the same. **Disagreements among participants in a conspiracy does not mean that they have not been and continued to be involved in the overall conspiracy.**" (emphasis added)); United States v. Walls, 70 F.3d 1323, 1327 (D.C. Cir. 1995)("even if the other co-conspirators had considered expelling Blakney from the conspiracy, she remained a member because she remained loyal to the conspiracy and made no affirmative attempt to withdraw"); Antar, 53 F.3d at 583 ("resignation from the enterprise does not, in and of itself, constitute withdrawal from a conspiracy"); United States v. Nava-Salazar, 30 F.3d 788, 799 (7th Cir. 1994) ("Withdrawal requires that the conspirator make himself 'completely unavailable for

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3. Assuming **arguendo** that Liggett established its withdrawal in about 1996 to 1997, evidence rebuts its withdrawal. First, Liggett continues to this day to obtain substantial proceeds from Liggett's joint conspiracy and scheme to defraud with the Defendants since Liggett continues to profit from addicted smokers who are the victims of the Defendants' and Liggett's conspiracy and scheme to defraud. Therefore, Liggett's financial stake in the continuing success of the conspiracy and the scheme to defraud and its continuing receipt of the fruits thereof rebut its withdrawal defense.[40]

Moreover, Liggett continues to engage in significant activities that further the objectives of the conspiracy and its scheme to defraud, including: marketing cigarettes to youths; deceptively marketing low tar cigarettes as safer or less hazardous and continuing to manipulate nicotine and delivery of nicotine in its cigarettes. See supra pp. 22-34. Moreover, Liggett

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[39](...continued)
the conspiracy's purposes.'") (citation and internal quotation marks omitted); United States v. DePriest, 6 F.3d 1201, 1206-07 (7th Cir. 1993) (despite fact that defendant and coconspirator had "falling out" over a debt from a previous drug transaction, after which the coconspirator determined not to have further drug dealings with the defendant, this did not establish withdrawal: "The burden to prove withdrawal remains firmly on the defendant even when it appears that he has been expelled from the conspiracy."); United States v. Schweihs, 971 F.2d 1302, 1323 (7th Cir. 1992) (that defendant was expelled from conspiracy by a co-conspirator and no longer allowed to play a part in the illegal activities did not establish withdrawal); United States v. Minicone, 960 F.2d 1099, 1108 (2d Cir. 1992)(defendant's "serious falling out" with co-conspirator to the point that the co-conspirator shot at the defendant did not establish withdrawal); United States v. Garrett, 720 F.2d 705, 714 (D.C. Cir. 1983)("mere cessation of activity in furtherance of the conspiracy does not constitute withdrawal. . . testimony that defendant had broken off relations completely with co-conspirators did not constitute withdrawal")(internal quotations deleted).

[40] Accord Zizzo, 120 F.3d at 1357-58; Antar, 53 F.3d at 583-84; United States v. Agueci, 310 F.2d 817, 839 (2d Cir. 1962); United States v. Tsai, 14 Fed. Appx. 834, 837 (9th Cir. 2001) ("One may still be considered part of the conspiracy when receiving profits from the conspiracy.").

continues to attempt to conceal documents and information relevant to issues of smoking and health that might be adverse to the interests of Liggett and the RICO Enterprise. See supra pp. 19-22, 35-37. Accord United States v. Perholtz, 842 F.2d 343, 357 (D.C. Cir. 1988)(defendant's "attempts to influence witnesses" and "acts of concealment . . . were parts of continuing activity. . . in furtherance of the survival of an ongoing operation" and conspiracy)(internal quotations and citations omitted).

The foregoing evidence conclusively rebuts Liggett's claim of withdrawal and establishes that Liggett continues to engage in misconduct that furthers the objectives of the conspiracy.[41]

[41] See, e.g., United States v. Berger, 224 F.3d 107, 119 (2d Cir. 2000) ("even if the defendant completely severs his or her ties with the enterprise, the defendant still may remain a part of the conspiracy if he or she continues to do acts in furtherance of the conspiracy and continues to receive benefits from the conspiracy's operations", and finding that evidence that the defendant continued to engage in conduct that advanced the goals of the conspiracy refuted withdrawal. (citing Antar)); Diaz, 176 F.3d at 98-99 (evidence of the defendant's meetings and discussions with other co-conspirators about conspiratorial matters rebuts withdrawal); United States v. Lash, 937 F.2d 1077, 1083-1084 (6th Cir. 1991) (even if defendant had withdrawn, from the conspiracy, "his subsequent acts neutralized his withdrawal and indicated his acquiescence"); United States v. Phillips, 664 F.2d 971, 1017-18 (5th Cir. 1981)(same); United States v. Lowell, 649 F.2d 950, 954, 957-58 (3d Cir. 1981)(holding that a single telephone conversation in which the defendant cautioned a co-conspirator to be careful because of ongoing investigations was sufficient to rebut the defendant's withdrawal); United States v. Borelli, 336 F.2d 376, 389 (2d Cir. 1964)(holding that "dissolution of the 1950 [drug distribution] partnership would not constitute an effective withdrawal so long as any of the contraband obtained during [the defendant's] partnership was being sold").

CONCLUSION

The United States has conclusively established that for many years Liggett was and continues to be a principal participant in the RICO Enterprise and conspiracy. Liggett's bare self-serving denial of its culpability is woefully insufficient to rebut such evidence. Likewise, Liggett has not even attempted to refute, much less succeed in rebutting, the overwhelming evidence that all Defendants, including Liggett, engaged in a pattern of racketeering activity.

Moreover, the United States established that it is entitled to equitable relief because it demonstrated that there is a reasonable likelihood that Liggett will violate the law in the future based upon the Defendants', including Liggett's, extensive pattern of past, deliberate unlawful conduct and evidence that Liggett is continuing to engage in misconduct in furtherance of the RICO Enterprise and conspiracy and their scheme to defraud.

Even assuming **arguendo** that Liggett abandoned or withdrew from the RICO conspiracy in 1996 to 1997, as it claims, Liggett nonetheless remands civilly liable for the RICO conspiracy because, absent a valid claim that a statute of limitations bars a defendant's liability, withdrawal does not absolve a defendant from civil liability for his participation in a conspiracy. Moreover, Liggett has not established that it made a full disclosure of the unlawful scheme to the authorities or took affirmative steps to defeat the conspiracy, as is required to establish withdrawal. Quite the contrary, Liggett persists in denying the existence of the RICO Enterprise and conspiracy and its participation in them, and Liggett continues to engage in misconduct in furtherance of the RICO Enterprise and conspiracy.

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